CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 34 OCTOBER 25, 2000 NO. 43

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the Customs Bulletin are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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Department of the Treasury
United States Customs Service

(T.D. 00-73)

SYNOPSES OF DRAWBACK RULINGS

The following are synopses of drawback rulings approved December 13, 1999, to July 10, 2000, inclusive, pursuant to Subparts A & B, Part 191 of the Customs Regulations.

In the synopses below are listed for each drawback ruling approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the date the application was signed, the Port Director to whom the ruling was forwarded to or approved by, the date on which it was approved and the ruling number.

Date: October 11, 2000
File: DRA-1-09

JOHN DURANT,
Director,
Commercial Rulings Division

(A) Company: Avecia Inc.
Articles: Not modified
Merchandise: Not modified
Application signed: June 14, 2000
Ruling Forwarded to PD of Customs: New York, June 29, 2000
Effect on other rulings: Successor to Zeneca Inc. T.D. 99-66-Z (44-05738-000) under 19 U.S.C. 1313(s)
Ruling: 44-05738-001

(B) Company: Avecia Inc.
Articles: Not modified
Merchandise: Not modified
Application signed: June 14, 2000
Ruling Forwarded to PD of Customs: New York, June 29, 2000
Effect on other rulings: Successor to Zeneca Inc. T.D. 97-53-Z (44-05030-000) under 19 U.S.C. 1313(s)
Ruling: 44-05030-001

(C) Company: Avecia Inc.
Articles: Not modified
Merchandise: Not modified
Application signed: June 14, 2000
Ruling Forwarded to PD of Customs: New York, June 29, 2000
Effect on other rulings: Successor to Zeneca Inc. T.D. 97-53-Y (44-04974-000) under 19 U.S.C. 1313(s)
Ruling: 44-04974-001

(D) Company: Avecia Inc.
Articles: Not modified
Merchandise: Not modified
Application signed: June 14, 2000
Ruling Forwarded to PD of Customs: New York, June 29, 2000
Effect on other rulings: Successor to Zeneca Inc. T.D. 97-53-W (44-04973-000) under 19 U.S.C. 1313(s)
Ruling:44-04973-001

(E) Company: Avecia Inc.
Articles: Not modified
Merchandise: Not modified
Application signed: June 14, 2000
Ruling Forwarded to PD of Customs: New York, June 29, 2000
Effect on other rulings: Successor to Zeneca Inc. T.D. 99-28-Z (44-05424-000) under 19 U.S.C. 1313(s)
Ruling: 44-05424-001

(F) Company: BP Amoco Chemical Company
Articles: Not modified
Merchandise: Not modified
Application signed: September 3, 1999
Modification approved by Port Director of Customs in accordance with §191.8(g)(2): Houston, December 13, 1999
Effect on other rulings: Modifies T.D. 93-10(B) to cover change in com pany name from Amoco Chemical Company to BP Amoco Chemical Company
Ruling: 44-03963-001

(G) Company: Cabot Corporation
Articles: Potassium tantalum fluoride
Merchandise: Tantalum hydroxide
Application signed: March 9, 2000
Ruling Forwarded to PD of Customs: New York, May 31, 2000
Effect on other rulings: None
Ruling: 44-05955-000

(H) Company: Chemguard, Inc.
Articles: Fire extinguishing chemicals
Merchandise: FORAFAC 1157N
Application signed: September 22, 1999
Ruling Forwarded to PD of Customs: Boston, May 31, 2000
Effect on other rulings: None
Ruling: 44-05952-000

(I) Company: Chemtall Inc.
Articles: Powder and emulsion polymers
Merchandise: Dimethylaminoethylacrylate (a/k/a Adame or Adam); Dimethylaminoethylmethacrylate (a/k/a Madame or Madam); methyl chloride; acrylic acid
Application signed: March 20, 2000
Ruling Forwarded to PD of Customs: Boston, May 4, 2000
Effect on other rulings: None
Ruling: 44-05942-000

(J) Company: Citgo Refining and Chemicals Company L.P.
Articles: Not modified
Merchandise: Not modified
Application signed: February 15, 2000
Ruling Forwarded to PD of Customs: Houston, June 29, 2000
Effect on other rulings: Successor to CITGO Refining and Chemicals, Inc. T.D. 95-10(1) (44-00400-000) under 19 U.S.C. 1313(s)
Ruling: 44-00400-001

(K) Company: E-HWA Synthetic International Corp.
Articles: Drawn textured yarn
Merchandise: Pre-oriented (partially oriented) polyester yarn a/k/a POY
Application signed: November 2, 1999
Ruling Forwarded to PD of Customs: San Francisco, June 6, 2000
Effect on other rulings: None
Ruling: 44-05964-000

(L) Company: First Chemical Corp.
Articles: Ethyl-p-dimethylaminobenzoate (EDAB), Ethylhexyl-p-dimethylaminobenzoate (ODAB)
Merchandise: Para-nitrobenzoic acid
Application signed: May 11, 1999
Ruling Forwarded to PD of Customs: New York, June 26, 2000
Effect on other rulings: None
Ruling: 44-05969-000

(M) Company: First Chemical Corp.
Articles: Isopropyl thioxanthone
Merchandise: 2, 2'-dithiodibenzoic acid
Application signed: March 16, 2000
Ruling Forwarded to PD of Customs: New York, June 29, 2000
Effect on other rulings: None
Ruling: 44-05968-000

(N) Company: Flexsys America L.P.
Articles: 4-ADPA (4-Aminodiphenylamine)
Merchandise: Santoflex® (6-PPD)
Application signed: June 11, 1999
Ruling Forwarded to PD of Customs: Boston, June 15, 2000
Effect on other rulings: None
Ruling: 44-05963-000(O) Company: General Electric Company
Articles: CYCOLOY® resin
Merchandise: Methymethacrylate-Butylacrylate-Siloxane polymer (MMA-BA-S)
Application signed: May 21, 1999
Ruling Forwarded to PD of Customs: New York, May 4, 2000
Effect on other rulings: None
Ruling: 44-05940-000

(P) Company: Lyondell Chemical Worldwide, Inc.
Articles: Not modified
Merchandise: Not modified
Supplemental application signed: October 1, 1999
Modification approved by Port Director of Customs in accordance with §191.8(g)(2): Houston, June 8, 2000
Effect on other rulings: Modifies T.D. 94-82(C) to cover change in company name from ARCO Chemical Company to Lyondell Chemi cal Worldwide, Inc.
Ruling: 44-00147-001

(Q) Company: Lyondell Chemical Worldwide, Inc.
Articles: Not modified
Merchandise: Not modified
Supplemental Application signed: October 1, 1999
Modification approved by Port Director of Customs in accordance with §191.8(g)(2): Houston, June 8, 2000
Effect on other rulings: Modifies T.D. 97-87(C) to cover change in company name from ARCO Chemical Company to Lyondell Chemical Worldwide, Inc.
Ruling: 44-04305-002

(R) Company: Magnequench International, Inc.
Articles: Magnequench powder & magnets
Merchandise: Neodymium metal
Application signed: July 26, 1999
Ruling forwarded to PD of Customs: New York, June 21, 2000
Effect on other rulings: None
Ruling: 44-05970-000

(S) Company: Microtouch Systems, Inc.
Articles: Computer touch screens
Merchandise: Flat soda lime capacitive acid etched glass (float glass)
Application signed: September 7, 1999
Ruling forwarder to PD of Customs: Boston, June 7, 2000
Effect on other rulings: None
Ruling: 44-05965-000

(T) Company: Pasco Processing, LLC
Articles: Orange juice from concentrate (reconstituted juice); frozen concentrated orange juice; bulk concentrated orange juice; blended juices and drinks, containing orange juice (reconstituted and frozen concentrate)
Merchandise: Concentrated orange juice for manufacturing
Application signed: April 7, 2000
Ruling Forwarded to PD of Customs: Miami, April 21, 2000
Effect on other rulings: None
Ruling: 44-05936-000

(U) Company: Shultz Steel Co.
Articles: Steel, titanium, nickel, stainless steel and aluminum forgings
Merchandise: Steel, titanium, nickel, stainless steel and aluminum bars, billets and ingots
Application signed: March 31, 2000
Ruling forwarder to PDs of Customs: Houston, San Francisco & New York, May 31, 2000
Effect on other rulings: Terminates T.D. 98-9-V (44-05271-001)
Ruling: 44-05271-002

(V) Company: Solutia Inc.
Articles: Santoquin (6-Ethoxy-1,2-dihydro-2,2,4-trimethylquinoline) a/k/a Santoflex AW and Ethoxyquin
Merchandise: Para-Phenetidine
Application signed: January 21, 2000
Ruling forwarded to PD of Customs: Chicago, June 2, 2000
Effect on other rulings: None
Ruling: 44-05962-000

(W) Company: Solutia Inc.
Articles: Saflex brand polyvinyl butyral sheeting (film)
Merchandise: Saflex S2075 plasticizer a/k/a S2075 plasticizer, plasticizer 2075, santicizer 2075, 3GEH, S-2075, and tri-ethylene-glycol di-2ethyl hexanoate
Application signed: January 10, 2000
Ruling forwarded to PD of Customs: Chicago, July 10, 2000
Effect on other rulings: None
Ruling: 44-05975-000

(X) Company: Sunrider Manufacturing, L.P.
Articles: Dry flavored beverage mixtures (Fortune Delight)
Merchandise: Dry food powder DFP51 (herbal powders)
Application signed: December 8, 1999
Ruling forwarded to PD of Customs: Chicago, April 18, 2000
Effect on other rulings: None
Ruling: 44-05933-000

(Y) Company: Troy Chemical Corp.
Articles: Propargyl butyl carbonate
Merchandise: Not modified
Supplemental application signed: January 6, 2000
Ruling Forwarded to PD of Customs: New York, June 12, 2000
Effect on other rulings: Modifies T.D. 99-30-X (44-05493-000)
Ruling: 44-05493-001

(Z) Company: UCB Chemicals Corporation
Articles: Polyester resins
Merchandise: Isophthalic acid (IPA); neopentyglycol (NPG)
Application signed: January 14, 2000
Ruling Forwarded to PD of Customs: Miami, July 10, 2000
Effect on other rulings: None
Ruling: 44-05977-000

Drawback decisions, synopses of:

Drawback decisions, synopses of:

U.S. Customs Service

General Notice

PERFORMANCE REVIEW BOARD -
APPOINTMENT OF MEMBERS

AGENCY: U.S. Customs Service, Department of the Treasury

ACTION: General Notice

SUMMARY: This notice announces the appointment of the members of the United States Customs Service Performance Review Boards (PRB's) in accordance with 5 U.S.C. 4314(c)(4). The purpose of the PRB's is to review senior executives' performance appraisals and to make recommendations regarding performance appraisals and performance awards.

EFFECTIVE DATE: October 1, 2000

FOR FURTHER INFORMATION CONTACT: Robert M. Smith, Assistant Commissioner, Human Resources Management, United States Customs Service, 1300 Pennsylvania Avenue, NW, Room 2.4-A, Washington, D.C. 20229; Telephone (202) 927-1250.

BACKGROUND

There are two (2) PRB's in the U.S. Customs Service.

Performance Review Board 1

The purpose of this Board is to review the performance appraisals of senior executives rated by the Commissioner of Customs. The members are:

Donnie Carter, Deputy Assistant Director, Criminal Enforcement Field Operations, East, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury

Anna Fay Dixon, Director, Office of Finance and Administration, Office of the Under Secretary for Enforcement, Department of the Treasury

Jane Sullivan, Director, Office of Information Resources Management, Department of the Treasury

Kenneth Papaj, Deputy Commissioner, Financial Management Service, Department of the Treasury

Jackquelyn Fletcher, Associate Director/CIO, U.S. Mint, Department of the Treasury

Performance Review Board 2

The purpose of this Board is to review the performance appraisals of all senior executives *except* those rated by the Commissioner of Customs. The members are:

William F. Riley, Director, Office of Planning, Office of the Commissioner

Assistant Commissioners:

Douglas M. Browning, International Affairs
Marjorie L. Budd, Training and Development
S.W. Hall, Information and Technology/CIO
C. Wayne Hamilton, Finance/CFO
William A. Keefer, Internal Affairs
Stuart P. Seidel, Regulations and Rulings
Robert M. Smith, Human Resources Management
Lance S. Statler, Congressional Affairs
Bonni G. Tischler, Field Operations

DATED: October 2, 2000

RAYMOND W. KELLY,
Commissioner of Customs

UNITED STATES CUSTOMS SERVICE

October 11, 2000

Department of the Treasury
Office of the Commissioner of Customs
Washington, D.C.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs field offices to merit publication in the Customs Bulletin.

STUART P. SEIDEL
Assistant Commissioner
Office of Regulations and Rulings

U.S. Customs Service

General Notices

19 CFR PART 177

PROPOSED REVOCATION OF CUSTOMS RULING LETTERS & TREATMENT RELATING TO TARIFF CLASSIFICATION OF LIGHTED SAFETY PRODUCTS INCLUDING VESTS, BELTS, ARM BANDS AND PET COLLARS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letters and treatment relating to the classification of lighted safety vests, lighted safety belts, lighted arm bands, and lighted safety pet collars.

SUMMARY: Pursuant to section 625 (c), Tariff Act of 1930, as amended, (19 U.S.C. 1625 (c)), this notice advises interested parties that Customs intends to revoke four ruling letters pertaining to the tariff classification of lighted safety products. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before October 25, 2000.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to the U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Mary Beth Goodman, Textile Branch, (202) 927-1368.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and

related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. § 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to revoke four rulings pertaining to the classification of lighted safety products including lighted safety vests, lighted safety pet collars, lighted safety arm bands, and lighted safety belts. Although in this notice Customs is specifically referring to four rulings, New York Ruling Letters ("NY") NY E87707, NY A82705, and NY F84030 and Headquarters Ruling Letter ("HQ") 950324, this notice covers any rulings on this merchandise, which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to those identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule. Any person involved in substantially identical transactions should advise Customs during this notice and comment period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of the final decision of this notice.

The subject safety products were originally classified under various headings of the Harmonized Tariff Schedule of the United States Annotated ("HTSUSA") without regard to the composite nature of the

safety product and the self contained lighting unit. The items under review are described as lighted safety products which are worn for increased protection while engaging in outside activity. The subject merchandise differentiates from other safety products due to the electronic signaling light system which emits light and thereby increases visibility for the wearer greater than the same product without the light source. Yet the subject safety products still provide increased visibility when worn without the lighting function activated and, as such, essential character determination is difficult. Therefore, pursuant to General Rule of Interpretation 3(c), the subject merchandise is properly classified according to which relevant heading appears last in the HTSUSA. It is Customs view that the safety products are more properly classified in heading 8531, HTSUSA, as other electronic sound or visual signaling apparatus.

In NY A82705, dated April 30, 1996, concerning the tariff classification of a safety vest with blinking lights from Taiwan, the product was classified under subheading 6117.80.9040, HTSUSA, as other made up knit clothing accessories. In NY E87707, dated October 15, 1999, concerning the tariff classification of a safety vest with lights from China, the product was classified under subheading 6117.80.9540, HTSUSA, the provision for other made up knit clothing accessories of man-made fibers. In HQ 950324, dated December 10, 1991, concerning the tariff classification of a woven nylon belt with lighting unit from Taiwan, the product was classified under heading 8513, HTSUSA, as a portable electric lamp designed to function by their own source of energy. In NY F84030, dated March 23, 2000, concerning the tariff classification of a lighted safety vest, lighted safety arm band, lighted safety pet collar and lighted safety belt, the products were classified with the safety belt in heading 6217, HTSUSA, as a clothing accessory; the safety vest in heading 6117, HTSUSA, as an other made up clothing accessory; the safety arm band in heading 8531, as an electronic or sound signaling apparatus; and the safety pet collar in heading 4201, HTSUSA, as saddlery and harness for animals. NY A82705 is set forth as "Attachment A" to this document. NY E87707 is set forth as "Attachment B" to this document. HQ 950324 is set forth as "Attachment C" to this document. NY F84030 is set forth as "Attachment D" to this document. Based upon a through review of this class of merchandise Customs is of the opinion that the correct classification for these products should be under subheading 8531.80.9050, HTSUSA, as other electric sound or visual signaling apparatus.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to revoke NY E87707, NY A82705, NY F84030 and HQ 950324 and any other ruling not specifically identified on identical or substantially similar merchandise to reflect the proper classification within the HTSUSA pursuant to the analysis set forth in Proposed Headquarters Rulings ("HQ") 964384 (*see* "Attachment E" to this document); HQ 964546 (*see* "Attachment F" to this document); HQ 964544 (*see* "Attachment G" to this document; and HQ 964545 (*see* "Attachment H" to this document).

Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

Date: October 10, 2000

MARVIN AMERNICK,
(For John Durant, Director)
Commercial Rulings Division

[Attachments]

ATTACHMENT A

NY A82705
April 30, 1996
CLA-2-61:RR:NC:5:353 A82705
CATEGORY: Classification
TARIFF NO.: 6117.80.9040

MS. VICKI WARREN
CIRCLE INTERNATIONAL, INC.
6405 East 48th Ave.
Denver, Colorado 80216

Re: The tariff classification of a safety vest from Taiwan.

Dear MS. WARREN:

In your letter dated April 16, 1996, on behalf of National Specialty Lighting, you requested a classification ruling. A sale for examination and will be returned as requested.

The submitted sale is a safety vest consisting of 100. nylon knit fabric with reflector strips with blinking lights. The garment has a front opening with a hook and loop closure and a battery pack attached to the side that causes the blinking lights to activate. The vest is used for roadside safety purposes to provide visibility for workers.

The applicable subheading for the safety vest will be 6117.80.9040, Harmonized Tariff Schedule of the United States (HTS), which provides for other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories: Other accessories: Other, of man-made fibers: Other. The duty rate will be 15.3 percent ad valorem.

The safety vest falls within textile category designation 659. Based upon international textile trade agreements products of Taiwan are subject to quota and the requirement of a visa.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Martin Weiss at 212-466-5881.

ROGER J. SILVESTRI,
Director,
National Commodity
Specialist Division

ATTACHMENT B

NY E87707
October 15, 1999
CLA-2-61:RR:NC:3:353 E87707
CATEGORY:Classification
TARIFF NO.: 6117.80.9540

MS. AMANDA XU
WORLD TRADING INC.
10 Cedar Glen
Irvine, CA 92604

Re: The tariff classification of a safety vest with lights from China.

Dear Ms. Xu:

In your letter dated September 17, 1999 you requested a classification ruling.

The submitted sample is called a Blinking-Worker Reflexible Body Lights that consists of mesh of a warp knit open work fabric. The safety vest fits over the upper torso and features a hook and loop strip front closure and open sides except for a 3-inch seam near the bottom. There are two 2-inch wide reflective plastic strips sewn from front to back of the vest and one 2-inch wide reflective plastic strip around the waist. The reflective plastic strip contains 12 to 19 flashing lights that run by battery. The item is used for worker safety in bad weather or in places with poor visibility. It should be noted that the item can function as a safety vest without the lights.

The applicable subheading for the Blinking-Worker Reflexible Body Lights will be 6117.80.9540, Harmonized Tariff Schedule of the United States (HTS), which provides for "Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories: Other accessories: Other: Other... Of man-made fibers: Other." The duty rate will be 15% ad valorem.

The Blinking-Worker Reflexible Body Lights falls within textile category designation 659. Based upon international textile trade agreements products of China are subject to quota and the requirement of a visa.

The designated textile and apparel categories and their quota and visa status are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information, we suggest that you check, close to the time of shipment, the U.S. Customs Service Textile Status Report, an internal issuance of the U.S. Customs Service, which is available at the Customs Web site at www.customs.gov. In addition, the designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected and should also be verified at the time of shipment.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kenneth Reidlinger at 212-637-7084.

ROBERT B. SWIERUPSKI,
Director,
National Commodity
Specialist Division

ATTACHMENT C

HQ 950324
December 10, 1991
CLA-2 CO:R:C:T 950324 KWM
CATEGORY: Classification
TARIFF NO.: 8513.10.4000

MR. SAMUEL K. LIAO
GENERAL TECH CORPORATION
2415 Midway Road, Suite 125
Carrollton, Texas 75006

Re: Hot Lights Body Signals; Composite good; belts; Wearing apparel; Made up textile article; Portable electric lamps.

Dear MR. LIAO:

This is in response to your inquiry dated July 18, 1991, regarding the tariff classification of merchandise named "Hot Lights Body Signals." Your request and a sample of the merchandise were forwarded to this office for a ruling.

Facts:

The merchandise at issue is described as "Hot Lights Body Signals" according to the literature forwarded with your request. The sample article consists of a woven nylon belt with a plastic snap buckle and a fitting to adjust the size. Attached to the belt by a hook-and-loop fastener is a lighting unit which consists of a plastic battery/switch case attached to a nylon strip containing five red lights. Your inquiry also states that the product may be imported with a removable pouch made of woven nylon material. The pouch is designed to hold the lighting unit and/or the belt when not in use.

The literature describes the article for wear around the waist while walking, jogging, bicycling, etc., for the purposes of visibility. The literature also describes the product's suitability for use on pets. The belt, lighting unit and pouch are manufactured in Taiwan.

Issue:

Is the Hot Lights Body Signal classified as belt in heading 6307 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) as a made up textile article, or in heading 8513, HTSUSA, as a portable electric lamp?

Law and Analysis:

Classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is made in accordance with the General Rules of Interpretation (GRI's). The systematic detail of the harmonized system is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relevant Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the

headings and legal notes do not otherwise require, the remaining GRI's may be applied, taken in order.

We find no tariff heading which provides for this article eo nomine. Therefore, Customs considers the Hot Lights Body Signal (Body Signal) to be a composite good consisting of the belt, the lighting unit and the pouch (when imported with the other articles). Composite articles are classified according to GRI 3, which states, in pertinent part that composite articles of different components are classified according to that component which provides the goods with their essential character.

In this case, we find that the essential character will be determined by the character of either the lighting unit or the belt. Customs has held that carrying pouches such as this, sold with a primary article, are classified with that primary article. The carrying pouch imported with the belt and lighting unit will therefore be classified with those components.

We have considered two headings for classification of this article: heading 6307, HTSUSA, which provides for other made up textile articles, and includes belts not having the character of accessories to wearing apparel, and heading 8513, HTSUSA, which provides for portable electric lamps designed to function by their own source of energy. Choosing between these headings, we find that the essential character of the Body Signal is imparted by the lighting unit. While the belt is used to attach the lighting unit to the body, and could arguably be used for other purposes, we find that the use of the article is clearly dependant on the lighting unit. The literature included with your letter shows that the central function of the good is for purposes of visibility. Without the lighting unit, the good cannot fulfill that function. An examination of the constituent role played by both components clearly weighs in favor of the lighting unit. Further, we note that the lighting unit has on one end a small hook which could arguably be used to attach the lighting unit to a belt or waistband, thereby negating the need for the belt entirely. Lastly, in determining essential character, Customs also considers other factors including weight and relative cost. We believe that both of these factors weigh in favor of the lighting unit.

Assuming, arguendo, that we consider both components to weigh equally in our essential character determination, GRI 3(c) provides that classification shall be made in that heading which occurs last in the nomenclature. In that case, the classification would again fall under heading 8513, HTSUSA.

You also requested a ruling with regard to the marking of the article. Your letter indicates that the Body Signal will be imported and retailed in a clear plastic package with a label inside the package. A copy of the label was included with your letter. We note that the sample is not marked with the country of origin, but that your letter indicates the final version will be so marked.

Articles comprising composite goods must generally be separately marked with their country of origin. See, T.D. 91-7. However, in this case, since the pouch, the belt, and the lighting unit are each manufactured in Taiwan, one conspicuous, legible, and permanent marking on the article will suffice. Without a sample of the packaged article, we cannot determine whether marking the package in lieu of the article itself is sufficient. Generally, as article may be excepted from marking when it's container is marked and Customs is satisfied that the article will reach the ultimate purchaser only in the marked container.

Holding:

The Hot Lights Body Signal is classified in subheading 8513.10.40, HTSUSA, which provides for portable electric lamps designed to function by their own source of energy (in this case dry cell batteries), lamps, other. The applicable rate of duty for this merchandise is 6.9 percent ad valorem.

JOHN A. DURANT,
Director,
Commercial Rulings Division

Attachment D

NY F84030
March 23, 2000
CLA-2-61:RR:NC:3:353 F84030
CATEGORY:Classification
TARIFF NO.: 6117.80.9540, 6217.10.9530,
4201.00.3000, 8531.80.9050

MR. JAMES WELTON
EAGLE INTERNATIONAL, LTD.
P.O. Box 66226
Chicago, IL 60666-0226

Re: The tariff classification of a flashing safety vest, belt, pet collar and armband from China.

Dear MR. WELTON:

In your letter dated March 1, 2000, on behalf of Illumination Polymer Technologies, Inc., you requested a classification ruling.

The submitted samples are a Lighted Safety Vest, Flashing Safety Belt, Flashing Safety Pet Collar and Flashing Safety Arm Band. You state that the Lighted Safety Vest is composed of woven nylon; however, examination reveals it to be constructed of knit 100% nylon mesh fabric. The safety vest features reflective plastic strips that extend over the shoulder from front to back, which contain flashing lights, and a battery pack powered by two AA batteries (not included). The Flashing Safety Belt is composed of woven 100% nylon fabric. The safety belt is worn around the waist and features an adjustable plastic buckle and a 15 inch long reflective strip, which contains lights, and a battery pack powered by one standard watch battery (not included). The Flashing Safety Pet Collar is composed of 100% nylon fabric. The pet collar features an adjustable plastic buckle, metal ring for leash attachment, and a five inch reflective strip, which contains lights, and a battery pack powered by one standard watch battery (included). The Flashing Safety Arm Band is composed of 100% nylon fabric. The arm band features an adjustable elastic band and a six inch reflective strip, which contains lights, and a battery pack powered by one standard watch battery (included).

The applicable subheading for the Lighted Safety Vest will be 6117.80.9540, Harmonized Tariff Schedule of the United States (HTS), which provides for "Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories: Other accessories: Other: Other, Of man-made fibers: Other." The duty rate will be 15% ad valorem.

The applicable subheading for the Flashing Safety Belt will be 6217.10.9530, Harmonized Tariff Schedule of the United States (HTS), which provides for "Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: Accessories: Other: Other, Of man-made fibers." The rate of duty will be 15% ad valorem.

The applicable subheading for the Flashing Safety Pet Collar will be 4201.00.3000, Harmonized Tariff Schedule of the United States (HTS), which provides for "Saddlery and harness for any animal (including traces, leads, knee pads, muzzles, saddle cloths, saddle bags, dog coats and the like), of any material: Dog leashes, collars, muzzles, harnesses and similar dog equipment." The rate of duty will be 2.4% ad valorem.

The applicable subheading for the Flashing Safety Arm Band will be 8531.80.9050, Harmonized Tariff Schedule of the United States (HTS), which provides for "Electric sound or visual signaling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading 8512 or 8530; parts thereof: Other apparatus: Other: Other, Other." The rate of duty will be 1.3% ad valorem.

The Lighted Safety Vest and Flashing Safety Belt fall within textile category designation 659. Based upon international textile trade agreements products of China are subject to quota and the requirement of a visa.

The designated textile and apparel categories and their quota and visa status are the result of international agreements that are subject to frequent renegotiations

and changes. To obtain the most current information, we suggest that you check, close to the time of shipment, the *U.S. Customs Service Textile Status Report*, an internal issuance of the U.S. Customs Service, which is available at the Customs Web site at www.customs.gov. In addition, the designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected and should also be verified at the time of shipment.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kenneth Reidlinger at 212-637-7084.

ROBERT B. SWIERUPSKI,
Director,
National Commodity
Specialist Division

ATTACHMENT E

HQ 964384
CLA-2 RR:CR:TE 964384 mbg
CATEGORY: Classification
TARIFF NO.: 8531.80.9050

MR. THOMAS J. O'DONNELL
MS. LARA A. RUTENBERGS
RODRIGUES O'DONNELL FUERST GONZALEZ & WILLIAMS
20 North Wacker Drive
Suite 1416
Chicago, Illinois 60606

Re: Revocation of NY F84030; Flashing/ lighted safety vest, belt, arm band and pet collar from China

Dear MR. O'DONNELL AND MS. RUTENBERGS:

This is in reply to your letter of July 28, 2000, on behalf of Illumination Polymer Technologies, Inc., requesting reconsideration of New York Ruling Letter ("NY") F84030. On March 23, 2000, Customs issued NY F84030 to Eagle International, Ltd., on behalf of your client, Illumination Polymer Technologies, Inc., regarding the tariff classification of various lighted safety products. In NY F84030 the lighted safety vest was originally classified in subheading 6117.80.9540 of the Harmonized Tariff Schedule of the United States Annotated ("HTSUSA") as other made up knitted clothing accessories; the safety belt was classified in subheading 6217.10.9530, HTSUSA, as a clothing accessory; the flashing safety pet collar was classified in subheading 4201.00.3000, HTSUSA, as saddlery and harness for animals; and the flashing safety arm band was classified in subheading 8531.80.9050, HTSUSA, as other electric sound or visual signaling apparatus. In preparing this reply, consideration was also given to your letter of August 14, 2000.

Upon review, Customs has determined that the NY ruling letter which was issued to Eagle International, Ltd., erroneously classified the subject merchandise. The correct classification for the merchandise is set forth herein and the tariff classification for the lighted safety merchandise in NY F84030 is hereby revoked for the reasons set forth below.

Facts:

NY F84030, dated March 23, 2000, provided HTSUSA classification for four different safety products, yet in your petition for reconsideration, you question the classification provided for the flashing safety vest, belt and pet collar but not the arm band. For ease of administration we are revoking NY F84030 in its entirety and issuing this ruling.

The first sample under consideration is a "Lighted Safety Vest." You claim that the safety vest comes in both a "poncho" style and a "split" style. The split style safety vest has an adjustable band on the side of the vest connecting the front and back portions of the vest and has a front opening that is secured with a VelcroÔ tab. The poncho style safety vest is worn over the head and the side VelcroÔ strips attach anywhere on the front VelcroÔ strip and serve as permanent closures to the side of the safety vest.

The safety vest is constructed of 100 percent nylon mesh fabric in either orange or lime green. The safety vest features 1 ¾ inch reflective plastic strips that extend over the shoulder from front to back. You claim that the "poncho" style safety vest also features a 2 inch reflective plastic strip across the front and back of the waist. The plastic strips are either yellow or white in color and contain a flexible lens through which a high intensity light is dispersed. The light can either remain steady or flash when activated by a switch on a battery pack powered by two AA batteries (not included). The battery pack is housed in a fitted nylon pouch with a VelcroÔ closing which is sewn to the vest.

The second sample under consideration is a Flashing Safety Belt. The safety belt is worn around that waist and features an adjustable plastic buckle and a 15 inch long reflective strip which contains lights, and a battery pack powered by one standard watch battery (not included). The battery pack is attached to the end of the flexible lens and is protected and secured by a piece of nylon fabric with a VelcroÔ tab. The safety belt is composed of woven 100 percent black nylon fabric.

The third sample under consideration is a Flashing Safety Pet Collar which is composed of 100 percent woven black nylon fabric. The pet collar features an adjustable plastic hook and loop fastener, metal ring for leash attachment, and a five-inch plastic reflective strip. The plastic strip contains the same flexible lens and battery pack powered by one standard watch battery (included). The battery pack is attached to the end of the flexible lens and is protected and secured by a piece of nylon fabric with a VelcroÔ tab.

The fourth sample under consideration is a Flashing Safety Arm Band. The arm band is composed of 100 percent nylon fabric and features an adjustable elastic band and a six inch reflective strip containing lights. The arm band also has battery pack powered by one standard watch battery which is included.

You have stated that the safety vest is designed, manufactured and marketed for police, crossing guards, construction workers, utility crews, aircraft employees and any other occupations where enhancing visibility is a safety requirement. You assert the safety products are also intended for outdoor enthusiasts who participate in activities such as running, walking, cycling, in-line skating and hunting.

Issue:

What is the proper tariff classification of the subject merchandise under the HTSUSA?

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied. The Explanatory Notes ("ENs") to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRIs.

There are four headings under the HTSUSA which must be considered for classification of the subject merchandise: heading 4201, provides for saddlery and har-

ness for animals; heading 6117, provides for other knitted or crocheted clothing accessories; heading 8513, provides for portable electric lamps designed to function by their own source of energy; and heading 8531, provides for electric sound or visual signaling apparatus.

Upon review, it is determined that no single heading within the HTSUSA specifically describes goods of this type. Because the merchandise cannot be classified pursuant to GRI 1, we apply the remaining GRIs in their appropriate order. GRI 2(b) provides that any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. However, GRI 2(b) adds that the classification of goods consisting of more than one material or substance shall be according to the principles of rule 3. Accordingly, GRI 3 is utilized when, by application of GRI 2(b), a good consists of materials or components which are *prima facie* classifiable under two or more headings.

In your brief for reconsideration of NY F84030 filed in the Office of Regulations & Rulings, you claim that the subject articles are "'more than' mere vests, belts, or collars." The "more than" doctrine was a principle of classification under the Tariff Schedules of the United States ("TSUS"), the precursor to the HTSUSA. Reference to the "more than doctrine" is inappropriate for classification of merchandise under the Harmonized Tariff Schedule.

Headquarters Ruling Letter (HRL) 080969, issued November 21, 1988, which involved classification under the TSUS explained, in pertinent part, that the "more than" doctrine, provided that:

> [w]here an article is in character or function something other than as described by a specific statutory provision-either more limited or more diversified-and the difference is significant, it cannot find classification within such provision. It is said to be more than the article described in the statute.

Robert Bosch v. United States, 43 Cust. Ct. 96, C.D. 3881 (1969).

GRI 2(b) is the HTSUSA counterpart to the "more than" doctrine. Similarly, EN XII to GRI 2(b) cautions that:

> [GRI 2(b)] does not, however, widen the heading so as to cover goods which cannot be regarded, as required under Rule 1, as answering the description in the heading; this occurs where the addition of another material or substance deprives the goods of the character of goods of the kind mentioned in the heading.

We agree with you that these articles, in their entirety, are not classifiable based on one component. The lighted safety merchandise uses technology to radiate and reflect light with a miniscule amount of electric current to operate. The importer has combined this technology with "traditional" neon colored safety articles such as a vest, belt, arm band and pet collar. In essence, neither the textile provisions nor electrical provisions encompass the articles in entirety. Because the articles consist of a combination of materials or components which are *prima facie* classifiable under two or more headings, we are directed by the GRIs to classify the articles pursuant to GRI 3 which states:

> (a). The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

As the electronic lighting devices as well as the underlying textile components could be classified in different headings, we are required to continue to the next principle, i.e., GRI 3(b):

> (b). Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The ENs to GRI 3(b) state:

> (VII). In all these cases the goods are to be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.
>
> (VIII). The factor which determines the essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

The subject safety articles incorporate a visual signaling device, developed by Illumination Polymer Technologies, Inc., using a technology that radiates and reflects light and needs a miniscule amount of electric current to operate. The light source increases the overall retail value of the safety articles and supports consideration of the light source. The light uses a lens that magnifies, disperses and radiates a light source throughout that product. The lighting unit can be switched for constant or rapid flashing light. The lighted wearer is visible from a longer distance than someone who is wearing a "regular" safety product, i.e., a safety vest or pet collar without a self contained light source.

Although a consumer would perhaps purchase these particular safety products specifically for the added feature of the lighting unit, Customs must also give consideration to the fact that these safety products appear to the naked eye to be virtually identical to other safety products that do not have a lighting unit. The safety vest, arm band, pet collar and belt remain functional as an identifier and will provide a greater degree of visibility during the daytime even when the lighting unit is not in operation. It is only when you activate the lights that the items have a different quality and therefore, essential character determination cannot readily be made pursuant to GRI 3(b).

GRI 3(c) provides:

> When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

Of those headings under consideration, the HTSUSA headings which refer to the classification of the lighted unit would occur last in the tariff. There are two possible headings which must be considered for such classification under the HTSUSA: heading 8513, provides for portable electric lamps designed to function by their own source of energy, and heading 8531, provides for electric sound or visual signaling apparatus.

In applying the rule of *ejusdem generis* to determine whether an item is embraced within a particular class, the courts have looked to the articles enumerated within that class to ascertain the characteristics they have in common. *Kotake Co., Ltd. v. United States*, 58 Cust. Ct. 196, C.D. 2934 (1967). The class of items classified within heading 8513 is that typical of lamps which emit a constant stream of light such as flashlights and certain types of lanterns. *See* Headquarters Ruling Letter (HQ) 951855, dated July 24, 1993; HQ 084852, dated March 28, 1990; HQ 953262, dated July 26, 1993; HQ 088993, dated July 29, 1991; and HQ 084852, dated March 28, 1990.

The ENs for Heading 8531, HTSUSA, state in pertinent part:

> With the exception of signaling apparatus used on cycles or motor vehicles and that for traffic control on roads, railways, etc., this heading covers *all* electrical apparatus used for signaling purposes, . . . using visual indication (lamps, flaps, illuminated numbers, *etc.*), and whether operate by hand or automatically.

(emphasis added.) As the class of goods classified in heading 8531, HTSUSA, is designed to be broad and encompass all electronic signaling apparatus not more specifically provided for elsewhere within the tariff schedule, Customs determines that by virtue of *ejusdem generis* the subject flashing safety belt, flashing safety arm band and flashing safety collar are within the purview of heading 8531, HTSUSA. This determination is consistent with NY E85273, dated August 25, 1999. By virtue of GRI 3(c), as heading 8531 appears last in the tariff schedule, the subject flashing safety belt, flashing safety arm band and flashing safety pet collar are properly classified in heading 8531, HTSUSA.

As part of this request for reconsideration of the subject flashing safety vest merchandise, we have reviewed the analysis behind the classification of safety vests under the HTSUSA. Customs has consistently classified safety vests, whether of textile or plastic as "clothing accessories" either in heading 3926, HTSUSA, as articles of plastics or in heading 6117, HTSUSA as other made up knit articles. *See* HQ 963614, 963615, 963616, Final Notice in Customs Bulletin Vol. 34, No. 22, May 31, 2000. In addition, *see* HQ 961170, dated March 24, 2000; HQ 963581, dated March 31, 2000; HQ 088549, dated September 4, 1991; NY E89696, dated December 6, 1999; NY E87515, dated October 6, 1999; and NY E82825, dated June 17, 1999.

If safety vests are determined by Customs to be "embedded" or completely covered" in plastics, then classification is *eo nomine* provided for within the HTSUSA and proper pursuant to GRI 1 according to the relevant legal notes such as:

Legal Note 2(a)(3) to Chapter 59, HTSUSA, which states that Heading 5903 applies to:

> Textile fabrics impregnated, coated, covered or laminated with plastics, whatever the weight per square meter and whatever the nature of the plastic material (compact or cellular) *other than*:
>
> * * *
>
> (3) Products in which the textile fabric is either completely embedded in plastic or entirely coated or covered on both sides with such material, provided that such coating or covering can be seen with the naked eye with no account being taken of any resultant change in color (chapter 39).

(emphasis added).

The intent of Note 2(a)(3) to Chapter 59 is to classify those products "embedded in" or "completely covered" with plastics under the headings that provide for plastics or articles of plastics because they have acquired the characteristics of plastics. Since the fabric from which a safety vest is constructed would be classifiable as a plastics good in chapter 39, a safety vest would be classifiable as an article of plastics. Thus, pursuant to GRI 1, a safety vest "embedded" or "completely covered" in plastics would be classified in subheading 3926.20.9050, HTSUSA, which provides for other apparel and clothing accessory articles of plastics.

On the contrary, if safety vests are not "embedded" or "completely covered" in plastics, but rather are constructed of nylon or polyester fabric which is typical of such merchandise, then the safety vests are properly classified in heading 6117, HTSUSA, as other made up knit clothing accessories or in heading 6217, HTSUSA, as other made up woven clothing accessories. Using a GRI 1 analysis, HQ 088549, dated September 4, 1991, and HQ 088056, dated February, 13, 1991, reasoned that safety vests are "worn over other clothing, for purposes of identification . . . [and] as such, [are] considered a clothing accessory, of textile material, which is properly included within heading 6117, HTSUSA." *See* HQ 088549, dated September 4, 1991. This rationale is hereby upheld, however, as previously stated, the subject flashing safety vest is a composite good and as such cannot be *eo nomine* classified within heading 6117, HTSUSA.

As previously stated, the subject flashing safety vest cannot be classified pursuant to GRI 1 since it is a composite good. Nor can classification be determined pursuant to GRI 3(b) since the essential character depends on both the lighted unit and the visible nature of the safety vest itself. Therefore, by virtue of GRI 3(c), classification of the subject safety vest is therefore proper in heading 8531, HTSUSA, as an electric sound or visual signaling apparatus.

Customs has classified safety vests similar to the flashing safety vest under consideration under heading 6117, HTSUSA, which provides, in part, for other made up clothing accessories and also has classified a belt similar to the flashing safety belt under consideration under heading 8513, HTSUSA, which provides, in part for, portable lamps. However, Customs is in the process of reviewing the classification determinations therein.

Holding:

NY F84030 is hereby revoked.

The subject flashing safety belt, flashing safety arm band, flashing safety collar,

and flashing safety vest, by virtue of GRI 3(c), are properly classified under subheading 8531.80.9050, HTSUSA, which provides for "Electric sound or visual signaling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading 8512 or 8530; parts thereof: Other apparatus: Other: Other: Other." The subject merchandise is dutiable at the general column one rate of 1.3 percent *ad valorem*.

Because GRI 3(c) has been used to classify this merchandise, it is limited to the specific facts and articles which are the subject of this decision. A slight change in the facts or articles could result in an essential character determination under GRI 3(b). Accordingly, importers of similar merchandise should review all of the rulings discussed in this decision and if doubt exists as to classification, request a ruling from the Customs Service.

JOHN DURANT,
Director,
Commercial Rulings Division

ATTACHMENT F

HQ 964546
CLA-2 RR:CR:TE 964546 mbg
CATEGORY: Classification
TARIFF NO.: 8531.80.9050

MR. SAMUEL K. LIAO
GENERAL TECH CORPORATION
2415 Midway Road, Suite 125
Carrollton, TX 75006

Re: Revocation of HQ 950324; Lighted safety belt from Taiwan

Dear MR. LIAO:

On December 10, 1991, Customs issued Headquarters Ruling Letter ("HQ") 950324 to your company regarding the tariff classification of a lighted safety belt from Taiwan under heading 8513 of the Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"). Upon review of similar merchandise which was recently considered by Customs for classification, Customs has determined that the subject merchandise is substantially similar and therefore, classification in heading 8513, HTSUSA, was incorrect. The correct classification for the product should be under heading 8531, HTSUSA, which provides for electric sound or visual signaling apparatus. HQ 950324 is hereby revoked for the reasons set forth below.

Facts:

The merchandise submitted for HQ 950324 was described as "Hot Lights Body Signals" according to the literature originally forwarded with your request. The sample article consists of a woven nylon belt with a plastic snap buckle and a fitting to adjust the size. Attached to the belt by a hook-and-loop fastener is a lighting unit which consists of a plastic battery/ switch case attached to a nylon strip containing five red lights. The inquiry submitted also stated that the product may be imported with a removable pouch made of woven nylon material. The pouch is designed to hold the lighted unit and/or the belt when not in use.

The literature describes the article for wear around the waist while walking, jogging, bicycling, etc. for purposes of visibility. The literatures also describes the product's suitability for use on pets. The belt, lighting unit and pouch are manufactured in Taiwan.

Issue:

What is the proper tariff classification of the subject merchandise under the HTSUSA?

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied. The Explanatory Notes ("ENs") to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in
understanding the scope of the headings and GRIs.

Upon review, it is determined that no single heading within the HTSUS specifically describes goods of this type. Because the merchandise cannot be classified pursuant to GRI 1, we apply the remaining GRIs in their appropriate order. GRI 2(b) provides that any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. However, GRI 2(b) adds that the classification of goods consisting of more than one material or substance shall be according to the principles of rule 3. Accordingly, GRI 3 is utilized when, by application of GRI 2(b), a good consists of materials or components which are *prima facie* classifiable under two or more headings.

It is Customs' opinion that these articles, in their entirety, are not classifiable based on one component. The lighted safety belt uses electricity to radiate and reflect light. Because the articles consist of a combination of materials or components which are *prima facie* classifiable under two or more headings, we are directed by the GRIs to classify the articles pursuant to GRI 3 which states:

> (a). The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

As the electronic lighting devices as well as the underlying textile components could be classified in different headings, we are required to continue to the next principle, i.e., GRI 3(b):

> (b). Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The ENs to GRI 3(b) state:

> (VII). In all these cases the goods are to be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.
>
> (VIII). The factor which determines the essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

The subject safety belt contains a light source which increases the retail value of the safety article and further supports consideration of the light source. The light uses reflector strips that radiates a light source throughout that product and allows the lighted wearer to be visible from a long distance.

Although a consumer would perhaps purchase this particular safety product specifically for the added feature of the lighting unit, Customs must also give consider-

ation to the fact that this safety belt appears to the naked eye to be virtually identical to other safety belts that do not have a lighting unit. The safety belt remains functional as an identifier and will provide a greater degree of visibility during the daytime even when the lighting unit is not in operation. It is only when you activate the lights that the item has a different quality and therefore, an essential character determination cannot readily be made pursuant to GRI 3(b).

GRI 3(c) provides:

> When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

Of those headings under consideration, the HTSUSA headings which refer to the classification of the lighted unit would occur last in the tariff. There are two possible headings which must be considered for such classification under the HTSUSA: heading 8513, provides for portable electric lamps designed to function by their own source of energy, and heading 8531, provides for electric sound or visual signaling apparatus.

Similar composite good and GRI 3 analysis was used in HQ 950324 which states in relevant part:

> We find no tariff heading which provides for this article *eo nomine*. Therefore, Customs considers the Hot Lights Body Signal (Body Signal) to be a composite good consisting of the belt, the lighting unit and the pouch (when imported with the other articles). Composite articles are classified according to GRI 3, which states, in pertinent part that composite articles of different components are classified according to that component which provides the goods with their essential character.
>
> In this case, we find that the essential character will be determined by the character of either the lighting unit or the belt. Customs has held that carrying pouches such as this, sold with a primary article, are classified with that primary article. The carrying pouch imported with the belt and lighting unit will therefore be classified with those components.
>
> We have considered two headings for classification of this article: heading 6307, HTSUSA, which provides for other made up textile articles, and includes belts not having the character of accessories to wearing apparel, and heading 8513, HTSUSA, which provides for portable electric lamps designed to function by their own source of energy.
>
> * * * *

Upon review by the Office of Regulations & Rulings, Customs has determined that HQ 950324 should have also considered heading 8531, HTSUS which provides for electronic and sound signaling apparatus.

The ENs for Heading 8531, HTSUS, state in pertinent part:

> With the exception of signaling apparatus used on cycles or motor vehicles and that for traffic control on roads, railways, etc., this heading covers *all* electrical apparatus used for signaling purposes, . . . using visual indication (lamps, flaps, illuminated numbers, *etc.*), and whether operate by hand or automatically.

(emphasis added.)

The class of items classified within heading 8513 is that typical of lamps which emit a constant stream of light such as flashlights and certain types of lanterns. *See* Headquarters Ruling Letter (HQ) 951855, dated July 24, 1993; HQ 084852, dated March 28, 1990; HQ 953262, dated July 26, 1993; HQ 088993, dated July 29, 1991; and HQ 084852, dated March 28, 1990.

In applying the rule of *ejusdem generis* to determine whether an item is embraced within a particular class, the courts have looked to the articles enumerated within that class to ascertain the characteristics they have in common. *Kotake Co., Ltd. v. United States*, 58 Cust. Ct. 196, C.D. 2934 (1967). As the class of goods classified in heading 8531, HTSUS, is designed to be broad and encompass all electronic signaling apparatus not more specifically provided for elsewhere within the tariff schedule, Customs determines that by virtue of *ejusdem generis* the subject flashing safety belt is properly classified in heading 8531, HTSUS. This determination is consistent with NY E85273, dated August 25, 1999.

Holding:

HQ 950324 is hereby revoked.

The subject safety belt, described as "Hot Lights Body Signals," is properly classified under subheading 8531.80.9050, HTSUSA, which provides for "Electric sound or visual signaling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading 8512 or 8530; parts thereof: Other apparatus: Other: Other: Other." The subject merchandise is dutiable at the general column one rate of 1.3 percent *ad valorem*.

Because GRI 3(c) has been used to classify this merchandise, it is limited to the specific facts and articles which are the subject of this decision. A slight change in the facts or articles could result in an essential character determination under GRI 3(b). Accordingly, importers of similar merchandise should review all of the rulings discussed in this decision and if doubt exists as to classification, request a ruling from the Customs Service.

JOHN DURANT,
Director,
Commercial Rulings Division

ATTACHMENT G

HQ 964544
CLA-2 RR:CR:TE 964544 mbg
CATEGORY: Classification
TARIFF NO.: 8531.80.9050

MS. VICKI WARREN
CIRCLE INTERNATIONAL, INC.
6405 East 48th Ave.
Denver, CO 80216

Re: Revocation of NY A82705; Lighted safety vest from Taiwan

Dear MS. WARREN:

On April 30, 1996, Customs issued New York Ruling Letter ("NY") A82705 to your company on behalf of your client, National Specialty Lighting, regarding the tariff classification of a lighted safety vest from Taiwan under heading 6117 of the Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"). Upon review of similar merchandise which was recently considered by Customs for classification, Customs has determined that the subject merchandise is substantially similar and therefore, classification in heading 6117, HTSUSA, was incorrect. The correct classification for the product should be under heading 8531, HTSUSA, which provides for electric sound or visual signaling apparatus. NY A82705 is hereby revoked for the reasons set forth below.

Facts:

The merchandise submitted for NY A82705 was a safety vest consisting of 100 percent nylon knit fabric with reflector strips with blinking lights. The article is described as having a front opening with a hook and loop closure and a battery pack attached to the side that causes the blinking lights to activate. The vest is used for roadside safety purposes to provide visibility for workers.

Issue:

What is the proper tariff classification of the subject merchandise under the HTSUSA?

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied. The Explanatory Notes ("ENs") to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRIs.

There are three headings under the HTSUSA which must be considered for classification of the merchandise under consideration: heading 6117, provides for other knitted or crocheted clothing accessories; heading 8513, provides for portable electric lamps designed to function by their own source of energy; and heading 8531, provides for electric sound or visual signaling apparatus.

Upon review, it is determined that no single heading within the HTSUSA specifically describes goods of this type. Because the merchandise cannot be classified pursuant to GRI 1, we apply the remaining GRIs in their appropriate order. GRI 2(b) provides that any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. However, GRI 2(b) adds that the classification of goods consisting of more than one material or substance shall be according to the principles of rule 3. Accordingly, GRI 3 is utilized when, by application of GRI 2(b), a good consists of materials or components which are *prima facie* classifiable under two or more headings.

It is Customs' opinion that this article, in its entirety, is not classifiable based on one component. The lighted safety vest uses electricity to radiate and reflect light. The importer has combined an electronic lighting device with "traditional" neon colored safety vest. In essence, neither the textile provisions nor electrical provisions encompass the articles in entirety. Because the articles consist of a combination of materials or components which are *prima facie* classifiable under two or more headings, we are directed by the GRIs to classify the articles pursuant to GRI 3 which states:

> (a). The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

As the electronic lighting devices as well as the underlying textile components could be classified in different headings, we are required to continue to the next principle, i.e., GRI 3(b):

> (b). Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The ENs to GRI 3(b) state:

> (VII). In all these cases the goods are to be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.
>
> (VIII). The factor which determines the essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

The subject safety vest contains a light source which increases the retail value of the safety article and supports consideration of the light source. The light uses reflector strips that radiate a light source throughout that product and allows the lighted wearer to be visible from a longer distance than someone who is wearing a "regular" safety product, i.e. a safety vest without a self contained light source.

Although a consumer would perhaps purchase this particular safety product specifically for the added feature of the lighting unit, Customs must also give consideration to the fact that this safety vest appears to the naked eye to be virtually identical to other safety vests that do not have a lighting unit. The safety vest remains functional as an identifier and will provide a greater degree of visibility during the daytime even when the lighting unit is not in operation. It is only when you activate the lights that the item has a different quality and therefore, an essential character determination cannot readily be made pursuant to GRI 3(b).

GRI 3(c) provides:

> When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

Of those headings under consideration, the HTSUSA headings which refer to the classification of the lighted unit would occur last in the tariff. There are two possible headings which must be considered for such classification under the HTSUSA: heading 8513, provides for portable electric lamps designed to function by their own source of energy, and heading 8531, provides for electric sound or visual signaling apparatus.

In applying the rule of *ejusdem generis* to determine whether an item is embraced within a particular class, the courts have looked to the articles enumerated within that class to ascertain the characteristics they have in common. *Kotake Co., Ltd. v. United States*, 58 Cust. Ct. 196, C.D. 2934 (1967). The class of items classified within heading 8513 is that typical of lamps which emit a constant stream of light such as flashlights and certain types of lanterns. *See* Headquarters Ruling Letter (HQ) 951855, dated July 24, 1993; HQ 084852, dated March 28, 1990; HQ 953262, dated July 26, 1993; HQ 088993, dated July 29, 1991; and HQ 084852, dated March 28, 1990,

The ENs for Heading 8531, HTSUSA, state in pertinent part:

> With the exception of signaling apparatus used on cycles or motor vehicles and that for traffic control on roads, railways, etc., this heading covers *all* electrical apparatus used for signaling purposes, . . . using visual indication (lamps, flaps, illuminated numbers, *etc.*), and whether operate by hand or automatically.

(emphasis added.) As the class of goods classified in heading 8531, HTSUSA, is designed to be broad and encompass all electronic signaling apparatus not more specifically provided for elsewhere within the tariff schedule, Customs determines that by virtue of *ejusdem generis* the subject flashing safety vest is properly classified in heading 8531, HTSUSA. This determination is consistent with NY E85273, dated August 25, 1999.

Customs has reviewed the analysis behind the classification of safety vests under the HTSUSA. Customs has consistently classified safety vests, whether of textile or plastic as "clothing accessories" either in heading 3926, HTSUSA, as articles of plastics or in heading 6117, HTSUSA, as other made up knit articles. *See* HQ 963614, 963615, 963616, Final Notice in Customs Bulletin Vol. 34, No. 22, May 31, 2000. In addition, *see* HQ 961170, dated March 24, 2000; HQ 963581, dated March 31, 2000; HQ 088549, dated September 4, 1991; NY E89696, dated December 6, 1999; NY E87515, dated October 6, 1999; and NY E82825, dated June 17, 1999.

If safety vests are determined by Customs to be "embedded" or completely covered" in plastics, then classification is *eo nomine* provided for within the HTSUSA and proper pursuant to GRI 1 according to the relevant legal notes such as:

Legal Note 2(a)(3) to Chapter 59, HTSUSA, which states that Heading 5903 applies to:

> Textile fabrics impregnated, coated, covered or laminated with plastics, whatever the weight per square meter and whatever the nature of the plastic material (compact or cellular) *other than*:

* * *

> (3) Products in which the textile fabric is either completely embedded in plastic or entirely coated or covered on both sides with such material, provided that such coating or covering can be seen with the naked eye with no account being taken of any resultant change in color (chapter 39).

(emphasis added).

The intent of Note 2(a)(3) to Chapter 59 is to classify those products "embedded in" or "completely covered" with plastics under the headings that provide for plastics or articles of plastics because they have acquired the characteristics of plastics. Since the fabric from which a safety vest is constructed would be classifiable as a plastics good in chapter 39, a safety vest would be classifiable as an article of plastics. Thus, pursuant to GRI 1, a safety vest "embedded" or "completely covered" in plastics would be classified in subheading 3926.20.9050 HTSUSA, which provides for other apparel and clothing accessory articles of plastics.

On the contrary, if safety vests are not "embedded" or "completely covered" in plastics, but rather are constructed of nylon or polyester fabric which is typical of such merchandise, then the safety vests are properly classified in heading 6117, HTSUSA, as other made up knit clothing accessories or in heading 6217, HTSUSA, as other made up woven clothing accessories. Using a GRI 1 analysis, HQ 088549, dated September 4, 1991, and HQ 088056, dated February, 13, 1991, reasoned that safety vests are "worn over other clothing, for purposes of identification . . . [and] as such, [are] considered a clothing accessory, of textile material, which is properly included within heading 6117, HTSUSA." *See* HQ 088549, dated September 4, 1991. This rationale is hereby upheld, however, as previously stated, the subject flashing safety vest is a composite good and as such cannot be *eo nomine* classified within heading 6117, HTSUSA.

As previously stated, the subject flashing safety vest cannot be classified pursuant to GRI 1 since it is a composite good. Nor can classification be determined pursuant to GRI 3(b) since the essential character depends on both the lighted unit and the visible nature of the safety vest itself. Therefore, by virtue of GRI 3(c), classification of the subject safety vest is therefore proper in heading 8531, HTSUSA, as an electric sound or visual signaling apparatus.

Customs has classified safety vests similar to the flashing safety vest under consideration under heading 6117, HTSUSA, which provides, in part, for other made up clothing accessories. However, Customs is in the process of reviewing the classification determination therein.

HOLDING:

NY A82705 is hereby revoked.

The subject safety vest with reflector strips with blinking lights is properly classified under subheading 8531.80.9050, HTSUSA, which provides for "Electric sound or visual signaling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading 8512 or 8530; parts thereof: Other apparatus: Other: Other: Other." The subject merchandise is dutiable at the general column one rate of 1.3 percent *ad valorem*.

Because GRI 3(c) has been used to classify this merchandise, it is limited to the specific facts and articles which are the subject of this decision. A slight change in the facts or articles could result in an essential character determination under GRI 3(b). Accordingly, importers of similar merchandise should review all of the rulings discussed in this decision and if doubt exists as to classification, request a ruling from the Customs Service.

JOHN DURANT,
Director,
Commercial Rulings Division

ATTACHMENT H

HQ 964545
CLA-2 RR:CR:TE 964545 mbg
CATEGORY: Classification
TARIFF NO.: 8531.80.9050

MS. AMANDA XU
WORLD TRADING INC.
10 Cedar Glen
Irvine, CA 92604

Re: Revocation of NY E87707; Lighted safety vest from China

Dear Ms. Xu:

On October 15, 1999, Customs issued New York Ruling Letter ("NY") E87707 to your company regarding the tariff classification of a lighted safety vest from China under heading 6117 of the Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"). Upon review of similar merchandise which was recently considered by Customs for classification, Customs has determined that the subject merchandise is substantially similar and therefore, classification in heading 6117, HTSUSA, was incorrect. The correct classification for the product should be under heading 8531, HTSUSA, which provides for electric sound or visual signaling apparatus. NY E87707 is hereby revoked for the reasons set forth below.

Facts:

The merchandise submitted for NY E87707 was described as a Blinking-Worker Reflexible Body Lights. The merchandise consists of mesh of a warp knit open work fabric. The safety vest fits over the upper torso and features a hook and loop strip front closure and open sides except for a 3 inch seam near the bottom. There are two 2 inch wide reflective plastic strips sewn from the front to the back of the vest and one 2 inch wide reflective plastic strip around the waist. The reflective plastic strip contains 12 to 19 flashing lights that run by battery. The item is used for worker safety in bad weather or in places with poor visibility.

Issue:

What is the proper tariff classification of the subject merchandise under the HTSUSA?

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied. The Explanatory Notes ("ENs") to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRIs.

There are three headings under the HTSUSA which must be considered for classification of the merchandise under consideration: heading 6117, provides for other knitted or crocheted clothing accessories; heading 8513, provides for portable electric lamps designed to function by their own source of energy; and heading 8531, provides for electric sound or visual signaling apparatus.

Upon review, it is determined that no single heading within the HTSUSA specifically describes goods of this type. Because the merchandise cannot be classified pursuant to GRI 1, we apply the remaining GRIs in their appropriate order. GRI 2(b) provides that any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. However, GRI 2(b) adds that the classification of

goods consisting of more than one material or substance shall be according to the principles of rule 3. Accordingly, GRI 3 is utilized when, by application of GRI 2(b), a good consists of materials or components which are *prima facie* classifiable under two or more headings.

It is Customs' opinion that this article, in its entirety, is not classifiable based on one component. The lighted safety vest uses electricity to radiate and reflect light. The importer has combined an electronic lighting device with "traditional" neon colored safety vest. In essence, neither the textile provisions nor electrical provisions encompass the articles in entirety. Because the article consists of a combination of materials or components which are *prima facie* classifiable under two or more headings, we are directed by the GRIs to classify the articles pursuant to GRI 3 which states:

> (a). The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

As the electronic lighting devices as well as the underlying textile components could be classified in different headings, we are required to continue to the next principle, i.e., GRI 3(b):

> (b). Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The ENs to GRI 3(b) state:

> (VII). In all these cases the goods are to be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.
>
> (VIII). The factor which determines the essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

The subject safety vest contains a light source which increases the retail value of the safety article and supports consideration of the light source. The light uses reflector strips that radiate a light source throughout that product and allows the lighted wearer to be visible from a longer distance than someone who is wearing a "regular" safety product, i.e., a safety vest without a self contained light source.

Although a consumer would perhaps purchase this particular safety product specifically for the added feature of the lighting unit, Customs must also give consideration to the fact that this safety vest appears to the naked eye to be virtually identical to other safety vests that do not have a lighting unit. The safety vest remains functional as an identifier and will provide a greater degree of visibility during the daytime even when the lighting unit is not in operation. It is only when you activate the lights that the item has a different quality and therefore, an essential character determination cannot readily be made pursuant to GRI 3(b).

GRI 3(c) provides:

> When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

Of those headings under consideration, the HTSUSA headings which refer to the classification of the lighted unit would occur last in the tariff. There are two possible headings which must be considered for such classification under the HTSUSA: heading 8513, provides for portable electric lamps designed to function by their own source of energy, and heading 8531, provides for electric sound or visual signaling apparatus.

In applying the rule of *ejusdem generis* to determine whether an item is embraced within a particular class, the courts have looked to the articles enumerated within that class to ascertain the characteristics they have in common. *Kotake Co., Ltd. v. United States*, 58 Cust. Ct. 196, C.D. 2934 (1967). The class of items classified within heading 8513 is that typical of lamps which emit a constant stream of light such as flashlights and certain types of lanterns. *See* Headquarters Ruling Letter (HQ) 951855, dated July 24, 1993; HQ 084852, dated March 28, 1990; HQ 953262, dated July 26, 1993; HQ 088993, dated July 29, 1991; and HQ 084852, dated March 28, 1990.

The ENs for Heading 8531, HTSUSA, state in pertinent part:

> With the **exception** of signaling apparatus used on cycles or motor vehicles and that for traffic control on roads, railways, etc., this heading covers *all* electrical apparatus used for signaling purposes, . . . using visual indication (lamps, flaps, illuminated numbers, *etc.*), and whether operate by hand or automatically.

(emphasis added.) As the class of goods classified in heading 8531, HTSUSA, is designed to be broad and encompass all electronic signaling apparatus not more specifically provided for elsewhere within the tariff schedule, Customs determines that by virtue of *ejusdem generis* the subject flashing safety vest is properly classified in heading 8531, HTSUSA. This determination is consistent with NY E85273, dated August 25, 1999.

Customs has reviewed the analysis behind the classification of safety vests under the HTSUSA. Customs has consistently classified safety vests, whether of textile or plastic as "clothing accessories" either in heading 3926, HTSUSA, as articles of plastics or in heading 6117, HTSUSA, as other made up knit articles. *See* HQ 963614, 963615, 963616, Final Notice in Customs Bulletin Vol. 34, No. 22, May 31, 2000. In addition, *see* HQ 961170, dated March 24, 2000; HQ 963581, dated March 31, 2000; HQ 088549, dated September 4, 1991; NY E89696, dated December 6, 1999; NY E87515, dated October 6, 1999; and NY E82825, dated June 17, 1999.

If safety vests are determined by Customs to be "embedded" or completely covered" in plastics, then classification is *eo nomine* provided for within the HTSUSA and proper pursuant to GRI 1 according to the relevant legal notes such as:

> Legal Note 2(a)(3) to Chapter 59, HTSUSA, which states that Heading 5903 applies to:
>
> > Textile fabrics impregnated, coated, covered or laminated with plastics, whatever the weight per square meter and whatever the nature of the plastic material (compact or cellular) *other than*:
> >
> > * * *
> >
> > (3) Products in which the textile fabric is either completely embedded in plastic or entirely coated or covered on both sides with such material, provided that such coating or covering can be seen with the naked eye with no account being taken of any resultant change in color (chapter 39).

(emphasis added).

The intent of Note 2(a)(3) to Chapter 59 is to classify those products "embedded in" or "completely covered" with plastics under the headings that provide for plastics or articles of plastics because they have acquired the characteristics of plastics. Since the fabric from which a safety vest is constructed would be classifiable as a plastics good in chapter 39, a safety vest would be classifiable as an article of plastics. Thus, pursuant to GRI 1, a safety vest "embedded" or "completely covered" in plastics would be classified in subheading 3926.20.9050 HTSUSA, which provides for other apparel and clothing accessory articles of plastics.

On the contrary, if safety vests are not "embedded" or "completely covered" in plastics, but rather are constructed of nylon or polyester fabric which is typical of such merchandise, then the safety vests are properly classified in heading 6117, HTSUSA, as other made up knit clothing accessories or in heading 6217, HTSUSA, as other made up woven clothing accessories. Using a GRI 1 analysis, HQ 088549, dated September 4, 1991, and HQ 088056, dated February, 13, 1991, reasoned that safety vests are "worn over other clothing, for purposes of identification . . . [and] as such, [are] considered a clothing accessory, of textile material, which is properly included within heading 6117, HTSUSA." *See* HQ 088549, dated September 4, 1991.

This rationale is hereby upheld, however, as previously stated, the subject flashing safety vest is a composite good and as such cannot be *eo nomine* classified within heading 6117, HTSUSA.

As previously stated, the subject flashing safety vest cannot be classified pursuant to GRI 1 since it is a composite good. Nor can classification be determined pursuant to GRI 3(b) since the essential character depends on both the lighted unit and the visible nature of the safety vest itself. Therefore, by virtue of GRI 3(c), classification of the subject safety vest is therefore proper in heading 8531, HTSUSA, as an electric sound or visual signaling apparatus.

Customs has classified safety vests similar to the flashing safety vest under consideration under heading 6117, HTSUSA, which provides, in part, for other made up clothing accessories and also has classified a belt similar to the flashing safety belt under consideration under heading 8513, HTSUSA, which provides, in part for, portable lamps. However, Customs is in the process of reviewing the classification determination therein.

Holding:

NY E87707 is hereby revoked.

The subject safety vest, described as Blinking –Worker Reflexible Body Lights, is properly classified under subheading 8531.80.9050, HTSUSA, which provides for "Electric sound or visual signaling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading 8512 or 8530; parts thereof: Other apparatus: Other: Other: Other." The subject merchandise is dutiable at the general column one rate of 1.3 percent *ad valorem*.

Because GRI 3(c) has been used to classify this merchandise, it is limited to the specific facts and articles which are the subject of this decision. A slight change in the facts or articles could result in an essential character determination under GRI 3(b). Accordingly, importers of similar merchandise should review all of the rulings discussed in this decision and if doubt exists as to classification, request a ruling from the Customs Service.

JOHN DURANT,
Director,
Commercial Rulings Division

19 CFR PART 177

PROPOSED REVOCATION OF CUSTOMS RULING LETTER & TREATMENT RELATING TO TARIFF CLASSIFICATION OF A WINDBREAKER

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Notice of proposed revocation of a tariff classification ruling letter and treatment relating to the classification of a windbreaker.

SUMMARY: Pursuant to Section 625 (c), Tariff Act of 1930, as amended, (19 U.S.C. 1625 (c)), this notice advises interested parties that Customs intends to revoke one ruling letter pertaining to the tariff classification of a windbreaker. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before October 25, 2000.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to the U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Mary Beth Goodman, Textile Branch, (202) 927-1368.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. § 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other in-

formation necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to revoke NY Ruling Letter ("NY") F86944, dated May 23, 2000, pertaining to the classification of a men's pullover windbreaker. Although in this notice Customs is specifically referring to one ruling, NY F 86944, this notice covers any rulings on this merchandise, which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to those identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule. Any person involved in substantially identical transactions should advise Customs during this notice and comment period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of the final decision of this notice.

The subject windbreaker was originally classified in NY F86944, dated May 23, 2000, in subheading 6211.33.0040 of the Harmonized Tariff Schedule Annotated ("HTSUSA"), as a men's shirt excluded from heading 6205. NY F86944 is set forth as "Attachment A" to this document. However, upon further review it was determined that the garment has the characteristics of a jacket rather than a shirt as set forth in the *Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories*, CIE 13/88 (Nov. 23, 1988). The windbreaker provides protection against the weather and it is Customs view that if the garment is found to be water resistant, the subject merchandise is more properly classified in subheading 6201.93.3000, HTSUSA, as a men's water resistant windbreaker and if the jacket is not determined to be water resistant, then the proper classification is subheading 6201.93.3511, HTSUSA, as a men's windbreaker of man-made fibers.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to revoke NY F86944 and any other ruling not specifically identified on identical or

substantially similar merchandise to reflect the proper classification within the HTSUSA pursuant to the analysis set forth in Proposed Headquarter Rulings ("HQ") 964203 (*see* "Attachment B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

Date: October 6, 2000

JOHN E. ELKINS,
(For John Durant, Director)
Commercial Rulings Division

[Attachments]

ATTACHMENT A

NY F86944
May 23, 2000
CLA-2-62:RR:NC:WA:355 F86944
CATEGORY:Classification
TARIFF NO.: 6211.33.0040

MR. JOHN PELLEGRINI
ROSS & HARDIES
65 East 55th Street
New York, NY 10022-3219

Re:The tariff classification of a men's pullover shirt from Indonesia, Thailand or China.

Dear MR. PELLEGRINI:

In your letter dated May 5, 2000, you requested a classification ruling on behalf of addidas, America, Inc.

You submitted a representative sample of a men's athletic shirt. It is identified as style 708177, and it is made of a 100 percent woven nylon shell with a knit lining made of a 65/35 polyester cotton blend fabric. You state that article numbers 708176 through 708184 and 711817 through 711819 are identical to the submitted sample except for color. The shirt features long sleeves, a lining and knit banding around the cuffs, the v-neck and the waist.

The applicable subheading for the shirt will be 6211.33.0040, Harmonized Tariff Schedule of the United States (HTS), which provides for other garments, men's or boys', of man-made fibers, shirts excluded from heading 6205. The duty rate will be 16.4 percent ad valorem.

The shirt falls within textile category designation 640. Based upon international textile trade agreements products of Indonesia, Thailand, or China are subject to quota and the requirement of a visa.

The designated textile and apparel categories and their quota and visa status are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information, we suggest that you check, close to the time of shipment, the U.S. Customs Service Textile Status Report, an internal issuance of the U.S. Customs Service, which is available at the Customs Web site at www.customs.gov. In addition, the designated textile and apparel categories may be subdivided into parts. If so, visa and quota require-

ments applicable to the subject merchandise may be affected and should also be verified at the time of shipment.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Camille Ferraro at 212-637-7082.

ROBERT B. SWIERUPSKI
Director,
National Commodity
Specialist Division

ATTACHMENT B

HQ 964203
CLA-2 RR:CR:TE 964203 mbg
CATEGORY: Classification
TARIFF NO.: 6201.93.3000, 6201.93.3511

JOHN B. PELLEGRINI, ESQ.
ROSS & HARDIES
Park Avenue Tower
65 East 55th Street
New York, NY 10022-3219

Re: Classification of windbreaker in subheading(s) 6201.93.3000 or 6201.93.3511; Revocation of NY F86944

Dear MR. PELLEGRINI:

This letter is in response to your request, on behalf of your client Adidas America, Inc., for reconsideration of New York Ruling Letter ("NY") F86944, dated May 23, 2000. The windbreaker was originally classified in heading 6211.33.0040 of the Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"). You requested that U.S. Customs Office of Regulations & Rulings reconsider the classification of the subject merchandise and it is the determination of this office that the subject merchandise is more properly classified in subheading 6201.93.3000, HTSUSA if determined to be water resistant or in the alternative in subheading 6201.93.3511, HTSUSA, if not determined to be water resistant pursuant to U.S. Additional Legal Note 2 for Chapter 62 of the HTSUSA.

Facts:

The subject merchandise consists of men's pullover articles, numbers 708176 through 708184 and 711817 through 711819. All are identical but for color. A sample of article number 708177 was submitted to Customs with your request. The garment is made of nylon fabric, exclusive of trim and will be manufactured in either China, Thailand or Indonesia. It has a v-neck collar with a rib knit band, no front opening, long sleeves with rib knit cuffs, a knit lining of a 65/35 polyester/cotton fabric, and a rib knit waistband. You have stated that the shell fabric of the garment has a plastic (acrylic) coating on its interior surface and qualifies as water resistant under Additional U.S. Note 2, Chapter 62, HTSUS. No supporting documentation is presented with such claim for water resistance.

Issue:

What is the proper classification of the subject merchandise?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification shall be determined according to the terms of the heading of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes ("EN") to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

The issue in the instant case is whether the submitted sample is properly classifiable as a men's shirt or jacket. A physical examination of the garment reveals that it possesses features traditionally associated with both jackets and shirts and therefore potentially lends itself to classification as either a coat or jacket under headings 6201, HTSUSA, or as a shirt under heading 6205, HTSUSA.

In circumstances such as these, where the identity of a garment is ambiguous for classification purposes, reference to *The Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories*, CIE 13/88, ("*Guidelines*") is appropriate. The *Guidelines* were developed and revised in accordance with the HTSUSA to ensure uniformity, to facilitate statistical classification, and to assist in the determination of the appropriate textile categories established for the administration of the Arrangement Regarding International Trade in Textiles.

The *Guidelines* offer the following with regard to the classification of men's or boys' shirt-jackets:

> Three-quarter length or longer garments commonly known as coats, and other garments such as. . . waist length jackets fall within this category. . . . A coat is an outerwear garment which covers either the upper part of the body or both the upper and lower parts of the body. It is normally worn over another garment, the presence of which is sufficient for the wearer to be considered modestly and conventionally dressed for appearance in public, either indoors or outdoors or both. . . .
>
> * * *

Shirt-jackets have full or partial front openings and sleeves, and at the least cover the upper body from the neck area to the waist... The following criteria may be used in determining whether a shirt-jacket is designed for use over another garment, the presence of which is sufficient for its wearer to be considered modestly and conventionally dressed for appearance in public, either indoors or outdoors or both:

(1) fabric weight equal to or exceeding 10 ounces per square yard;

(2) a full or partial lining;

(3) pockets at or below the waist;

(4) back vents or pleats. Also side vents in combination with back seams;

(5) Eisenhower styling;

(6) a belt or simulated belt or elasticized waist on hip length or longer shirt-jackets;

(7) large jacket/coat style buttons, toggles or snaps, a heavy-duty zipper or other heavy-duty closure, or buttons fastened with reinforcing thread for heavy-duty use.

(8) lapels;

(9) long sleeves without cuffs;

(10) elasticized or rib knit cuffs;

(11) drawstring, elastic or rib knit waistband.

* * *

> Garments having features of both jackets and shirts will be categorized as coats if they possess at least three of the above-listed features and if the

> result is not unreasonable. . . . Garments not possessing at least three of the listed features will be considered on an individual basis.

See Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories, CIE13/88 at 5-6 (Nov. 23, 1988).

Customs recognizes that the garment at issue is a hybrid garment, possessing features of both shirts and jackets. A physical examination of the garment at issue reveals that it possesses three of the *Guidelines* jacket criteria: the garment has elasticized or rib-knit cuffs, a ribbed waistband, and an inner lining. The garment therefore possesses the requisite number of *Guidelines* criteria and in addition is constructed from woven nylon which is typically used in windbreakers. The sample submitted is much like the jackets worn by golfers or other athletes for warmth or for protection from light rain.

The next issue is whether the garment at issue is classifiable as an anorak, wind-breaker or similar article of heading 6201, HTSUSA. The Explanatory Notes (EN) to heading 6101, which apply *mutatis mutandis* to the articles of heading 6201, HTSUSA, state:

> [T]his heading covers ... garments for men or boys, characterised by the fact that that they are generally worn over all other clothing for protection against the weather.

It is the opinion of this office that the fabric used in the construction of the subject merchandise will provide a degree of protection against the weather due to the overall styling, knit lining, and woven nylon fabric. Accordingly, the merchandise is classifiable under heading 6201, HTSUS.

You claim that the subject merchandise is water resistant but have not submitted any information which validates such claim. The Additional U.S. Note to Chapter 62 addresses the term "water resistant" and states in pertinent part:

> For the purposes of [subheading 6201.93.30], the term *"water resistant"* means that garments classifiable in those subheadings must have a water resistance (see ASTM designations D 3600-81 and D 3781-79) such that, under a head pressure of 600 millimeters, not more than 1.0 gram of water penetrates after two minutes when tested in accordance with AATCC Test Method 35-1985. This water resistance must be the result of a rubber or plastics application to the outer shell, lining, or inner lining.

The port of entry may perform such test for water resistant determinations and *if* the subject merchandise meets the aforementioned standards of U.S. Additional Note, Chapter 62, HTSUSA, the subject merchandise will be classified in subheading 6201.93.30, HTSUSA.

Holding:

If the subject merchandise is determined to be water resistant, then the garment is classifiable under subheading 6201.93.3000, HTSUSA, which provides for "Men's or boys' overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets), windbreakers, and similar articles (including padded, sleeveless jackets), other than those of heading 6203: Anoraks (including ski jackets), windbreakers and similar articles (including padded, sleeveless jackets): Of man-made fibers: Other: Other: Other: Water resistant." The general column one rate of duty is 7.3% ad valorem. The applicable textile restraint category is 634.

If the subject merchandise is not determined to be water resistant, then the garment is classifiable under subheading 6201.93.3511, HTSUSA, which provides for "Men's or boys' overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets), windbreakers, and similar articles (including padded, sleeveless jackets), other than those of heading 6203: Anoraks (including ski jackets), windbreakers and similar articles (including padded, sleeveless jackets): Of man-made fibers: Other: Other: Other: Other: Men's." The general column one rate of duty is 28.4% ad valorem. The applicable textile restraint category is 634.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that your client check, close to the time

of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is updated weekly and is available at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification), and the restraint (quota/visa) categories, your client should contact its local Customs office prior to importing the merchandise to determine the current applicability of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division

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19 CFR PART 177

MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF STEEL SHOE HORN

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of ruling letter and revocation of treatment relating to the classification of steel shoe horns.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling letter pertaining to the tariff classification of steel shoe horns and revoking any treatment previously accorded by the Customs Service to substantially identical transactions. Notice of the proposed modification and revocation of treatment was published on August 30, 2000, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after October 25, 2000.

FOR FURTHER INFORMATION CONTACT: Benjamin J. Bornstein, General Classification Branch, (202) 927-2388.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts

are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to Customs obligations, a notice was published on August 30, 2000, in the CUSTOMS BULLETIN, Volume 34, No. 35, proposing to modify NY D81370, dated August 31, 1998, which classified steel shoe horns in subheading 8205.59.80, HTSUS. No comments were received in response to this notice.

As stated in the proposed notice of modification and revocation of treatment, this modification and revocation of treatment will cover any rulings on this merchandise that may exist but which have not been specifically identified. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is modifying NY D81370 to reflect the proper classification of the steel shoe horns in subheading 8205.59.55, HTSUS, as "[h]andtools ***: Other handtools (including glass cutters) and parts thereof: Other: Other: Of iron or steel:***Other," pursuant to the analysis in HQ 963730. This decision is set forth as the Attachment to this document. Additionally,

pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment it previously accorded to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN."

Dated: October 10, 2000

MARVIN AMERNICK
(For John Durant, Director)
Commercial Rulings Division

[Attachment]

ATTACHMENT

HQ 963730
October 10, 2000
CLA-2 RR:CR:GC 963730 BJB
CATEGORY: Classification
TARIFF NO.: 8205.59.55

MS. SHELIA ANDREWS
CUSTOMS COMPLIANCE MANAGER
DILLARD DEPARTMENT STORES, INC.
11701 Otter Creek Road South
Mabelvale, AR 72103

Re: *NY* D81370 Modified; Steel shoe horn.

Dear MS. ANDREWS:

This is in reference to NY D81370, issued to you on August 31, 1998, by the Customs National Commodity Specialist Division, New York. In that ruling, three sample manicure sets were submitted for classification. One of the sets, Style #9770BW, included a steel shoe horn. The steel shoe horn was determined to be separately classifiable under subheading 8205.59.80, Harmonized Tariff Schedule Of The United States (HTSUS).

We have reviewed the decision in NY D81370 and have determined that the classification of the steel shoe horn is in error. This ruling modifies NY D81370 with respect to this article and sets forth its correct classification.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057 (1993), notice was published on August 30, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 35, proposing to modify *NY* D81370, dated August 31, 1998, and to revoke the tariff treatment pertaining to the tariff classification of a "steel shoe horn." No comments were received in response to that notice.

Facts:

The merchandise consists of a steel metal shoe horn. The shoe horn is a hand-held, curved piece of metal, used as an aid in putting on shoes. An individual inserts the broad curved end of the shoe horn at the back of the aperture located on a shoe, as one inserts a foot, toes first into the shoe aperture, the individual is aided in placing the foot into the shoe as the heel glides down the curved surface of the shoe horn into the shoe cavity. In your letter, dated August 13, 1998, re-

questing a tariff classification ruling, you claimed that the steel shoe horn, was part of a manicure set identified as Style # 9770BW. In NY D81370, dated August 31, 1998, Customs determined that the inclusion of items such as pen knives with knives, combs, bottle opener and mirrors removed the merchandise submitted with the three proposed manicure sets, from consideration as sets. The steel shoe horn was separately classified under subheading 8205.59.80, HTSUS, which provides for "[h]ousehold tools and parts thereof: [o]f iron or steel: other."

Issue:

Whether the subject steel shoe horn, is classifiable under subheading 8205.59.80, HTSUS, as a handtool made of steel, or pursuant to subheading 8205.59.55, HTSUS, as "[h]andtools . . . : Other handtools (including glass cutters) and parts thereof:. . . :Other: . . . Other: . . Other[.]"

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRIs). Under General Rule of Interpretation (GRI) 1, HTSUS, goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. Customs believes the ENs should always be consulted. *See* T.D. 98-80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The HTSUS subheadings under consideration are as follows:

8205	Handtools (including glass cutters) not elsewhere specified or included; blow torches and similar self-contained torches; vises, clamps and the like, other than accessories for and parts of machine tools; anvils; portable forges; hand-or pedal-operated grinding wheels with frameworks; base metal parts thereof:				
*	*	*	*	*	
8205.59	Other:				
	Other:				
	Of iron or steel:				
*	*	*	*	*	
8205.59.55	Other				
*	*	*	*	*	
8205.59.80	Other . . .				
*	*	*	*	*	

Heading 8205, HTSUS, covers, in pertinent part, handtools, not elsewhere specified or included. EN 82.05, states that this "heading covers all hand tools **not included** in other headings of this Chapter or elsewhere in the Nomenclature (see the General Explanatory Notes to this Chapter), together with certain other tools or appliances specifically mentioned in the title. It includes a large number of hand tools (including some with simple hand-operated mechanisms such as cranks, ratchets or gearing)." EN 82.05 (E)(1), notes, in relevant part that, **"[o]ther hand tools"** includes: (1) A number of household articles, including . . . bottle openers, simple can openers, . . . [and] shoe horns[.]" (Emphasis in the original)." Given that the steel shoe horn is a hand-tool not more specifically described in any other heading, it is provided for in heading 8205, HTSUS.

In NY D81370, Customs determined that "all the items [included in the 3 pro-

posed sample sets submitted] w[ould] be separately classified with the exception of the [carrying] cases." (NY D81370, August 31, 1998). The shoe horn was determined classifiable under subheading 8205.59.80, HTSUS, based upon the mistaken understanding that it was of an "other metal." In fact, the shoe horn is of steel, as stated in your August 13, 1998 letter. Thus the shoe horn, entirely made of steel, is not described by subheading 8205.59.80, HTSUS, which relates to handtools not made of iron or steel, copper or aluminum.

The steel shoe horn at issue is classifiable at subheading 8205.59.55, HTSUS, within "[h]andtools . . .: Other handtools (including glass cutters) and parts thereof: Other: Other: Of iron or steel: . . .Other[.]"

Holding:

Under the authority of GRI 1, HTSUS, applied to the subheading level by GRI 6, HTSUS, the subject steel shoe horn, a one-piece unit with no interchangeable pieces, is provided for in heading 8205, HTSUS, and is classifiable separately from the other articles reviewed in NY D81370, under subheading 8205.59.55, HTSUS, as "[h]andtools . . . : Other handtools (including glass cutters) and parts thereof: Other: Other: Of iron or steel: . .. Other[.]"

Effect On Other Rulings:

NY D81370, dated August 31, 1998, is **MODIFIED** with respect to the steel shoe horn as set forth herein. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN DURANT,
Director,
Commercial Rulings Division

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19 CFR PART 177

REVOCATION OF RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF BULK IMPORTS OF CHONDROITIN SULFATE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letters relating to tariff classification of chondroitin sulfate (CS) imported in bulk form (CAS #12678-07-8).

SUMMARY: Pursuant to section 1625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking three rulings, and any treatment previously accorded by Customs to substantially identical transactions, concerning the tariff classification of CS imported in bulk form under the Harmonized Tariff Schedule of the United States (HTSUS). Notice of the proposed revocation was published on August 23, 2000, in Volume 34, Number 34 of the CUSTOMS BULLETIN. As discussed in the "Background" portion of this document, five comments were received in response to this notice.

EFFECTIVE DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after October 25, 2000.

FOR FURTHER INFORMATION CONTACT: Allyson Mattanah, General Classification Branch, Office of Regulations and Rulings (202) 927-2326.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI") became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that, in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

On August 23, 2000, Customs published a notice in the CUSTOMS BULLETIN, Volume 34, Number 34 proposing to revoke New York Ruling Letter (NY) A82011, dated June 20, 1996, New York Ruling Letter (NY) 815350, dated October 19, 1996, and Headquarters Ruling (HQ) 960053, dated October 21,1997, which classified CS imported in bulk form in subheading 3001.90.00, HTSUS, as animal substances prepared for therapeutic or prophylactic use. Five comments were received in response to this notice.

In NY A82011, NY 815350, and HQ 960053, this merchandise was classified in subheading 3001.90.00, HTSUS, because it is a heparin-like substance. Chondroitin 4-Sulfate and Chondroitin 6-Sulfate are listed in the USP Dictionary of USAN and International Drug Names 1998 with a note to "see Danaparoid Sodium." Danaparoid Sodium is a mixture of the salts of heparan sulfate including 4% of chondroitin sulfate. Heading 3001, HTSUS, specifically includes heparin and the

ENs for the heading describe heparin and its salts thus:

> (c) Heparin and its salts. Heparin consists of a mixture of complex organic acids (muco-polysaccharides) obtained from mammalian tissues. Its composition varies according to the origin of the tissues. Heparin and its salts are used chiefly in medicine, especially as blood anti-coagulants. They remain classified here whatever their degree of activity.

However, CS itself is not heparin and is therefore not *eo nomine* included in HTSUS heading 3001.

Furthermore, to be classifiable in heading 3001, HTSUS, an animal substance (other than glands and other organs or heparin) must be "prepared for therapeutic or prophylactic uses." By its terms, heading 3001, HTSUS, is a "use" provision. When two or more tariff categories are equally descriptive of an item, one that describes a "use" governs over one which describes the composition of the item. *Totes, Inc. v. United States*, 69 F. 3d 495 (Fed Cir. 1995) (citations omitted). It is well settled law that merchandise is classified according to its condition when imported. *United States v. Citroen*, 223 U.S. 407, 414-15, 56 L. Ed.486, 32 S. Ct. 259 (1911). If the rule were otherwise, not only could the same product be subject to different duty rates depending on its intended end use, but Customs would be flooded with affidavits or other evidence of differing intended uses. *Mita Copystar America v. The United States*, 21 F.3d 1079 (Fed. Cir. 1994). Therefore, the determinative issue is **whether CS, as imported, is principally prepared for therapeutic or prophylactic use in the U.S.**

The goods that are the subject of NY A82011 and NY 815350 are ostensibly imported for pharmaceutical research. The goods which are the subject of HQ 960053 are imported for use in animal feed. Commenters have pointed to voluminous research which shows that CS may have therapeutic properties in the treatment of joint pathologies in animals, and in osteoarthritis and heart disease in humans. Commenters have also pointed to the probable use of specially formulated low molecular weight chondroitin sulfate (LMWCS) in a National Institute of Health (NIH), Food and Drug Administration (FDA) phase III study on the treatment of osteoarthritis of the knee.

These studies do not change the fact that presently, in the U.S., CS is marketed and sold as a dietary supplement. Even specially formulated LMWCS is presently incorporated into formulations sold as dietary supplements. At this point in time, Customs can not separate out different types of CS when they are all used as a dietary supplement. (see *Mita Copystar, supra* at 1082).

In compliance with the Dietary Supplement Health and Education Act of 1994, CS preparations contain the legally required disclaimer that "the product is not intended to diagnose, treat, cure or prevent any disease." One commenter noted that not all CS products contain this disclaimer on their label. It is true that FDA regulations only require the disclaimer on products that claim to have therapeutic or

prophylactic properties. Therefore, those products that do not display this disclaimer certainly are not claiming that they are prepared for use as a therapeutic or prophylactic substance.

Citing several court decisions, several commenters noted that the FDA's use of a term does not control Customs classification decisions. However, Customs is not classifying the product according to the definition of the terms "therapeutic" and "prophylactic" in FDA statutes. Rather, the FDA regulates the use of this product in the U.S. Where customs must determine whether a "use" provision applies to a substance, the controlling regulatory scheme is indeed relevant.

More importantly, the Courts have delineated some of the factors to consider in determining whether a product falls within the class or kind of a particular "use" provision. These are: (1) the general physical characteristics, (2) the expectation of the ultimate purchaser, (3) the channels of trade, (4) the environment of sale (accompanying accessories, manner of advertisement and display), (5) the use in the same manner as merchandise which defines the class, (6) the economic practicality of so using the import, and (7) the recognition in the trade of this use. See *Lenox Collections v. United States*, 19 CIT 345, 347 (1995); *Kraft, Inc, v. United States*, 16 CIT 483 (1992), *G. Heileman Brewing Co. v. United States*, 14 CIT 614 (1990); and *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F.2d 373 (1976), *cert. denied*, 429 U.S. 979 (1976).

Applying these factors, we find that they weigh overwhelmingly in favor of finding that CS is not prepared principally for use in the U.S. for therapy or prophylaxis thus:

(1) The general physical characteristics of CS is that of a mucopolysaccharide, like rubber.

One commenter claims that LMWCS is more like heparin than rubber and claims that it should be classified *nocitur a sociis* ("known by its associates") as heparin in subheading 3001, HTSUS. To bolster the argument, the commenter cites the case of *Western Dairy Products, Inc. v. the United States*, 510 F.2d 376, (1975), wherein the court found that calcium reduced dried skim milk (CRDSM) was classified as an article of milk not specially provided for, rather than as an edible product not otherwise provided for, under the Tariff Schedules of the United States (TSUS), the predecessor of the HTSUS. In that case, the court noted that the specific tariff language mandated that all articles of milk, edible or non-edible, be classified under the milk provisions. The analogy does not apply to the instant case. The tariff provision at issue here does not suggest an intent that all articles similar to heparin be classified in this provision. Moreover, CS is not like heparin in the ways that CRDSM is like milk. CRDSM, like the *eo nomine* yogurt and whey of the heading in the TSUS, is made from milk that has been modified by a chemical change. Heparin is derived from animal livers or lungs. Hawley's Condensed Chemical Dictionary, 592 (11th Edition, Van Nostrand Reinhold Co., Inc., 1987). CS is derived from animal cartilage. CS is not a modified heparin.

The case cited and theory of *nocitur a sociis* is therefore irrelevant to our determination of the proper classification of CS.

(2) The expectation of the ultimate purchaser is that CS increases the general health of their bones and joints and may treat joint ailments through the same mechanism that it improves joint function generally.

(3) The channels of trade and environment of sale is through health food stores and pharmacies shelved with the dietary supplements. One can also purchase the product electronically on the internet through web sites promoting natural products for maintaining general good health. Products containing LMWCS are available from a pharmacy but no prescription is needed to obtain them and their package includes the FDA disclaimer mandated for dietary supplements.

(4) The product is advertised as a substance which maintains healthy joints.

(5) The product is used as a dietary supplement. One commenter argued that CS is "prepared" for use as a therapeutic or prophylactic agent in a similar manner as tomatoes were "prepared" for use as a tomato sauce in *Orlando Food Corp. V. United States*, 140 F.3d 1437 (Fed. Cir. 1998). There the issue was whether canned tomatoes prepared with tomato puree, basil, salt and citric acid were classifiable under the HTSUS as "prepared tomatoes" or as tomatoes "prepared for sauce". The court noted that the tomatoes were specifically prepared for sauce because the product was used "solely as an advanced base or preparation for sauces." The court classified the tomatoes at issue under the more specific "use" provision.

In the instant case, we do not believe that CS is described within the text of heading 3001, HTSUS, the more specific "use" provision. Unlike in *Orlando, supra*, the substance is not prepared for a sole use. The basic preparatory steps in the manufacture of the CS, extraction from animal cartilage, drying, and milling into a fine powder, occur whether or not the CS is being used as a dietary supplement. The very same CS which is sold as a dietary supplement may currently be recommended for use to "treat" osteoarthritis. Thus, *Orlando, supra* does not apply to the instant case.

Several commenters noted that CS has therapeutic and prophylactic use as witnessed by copious amounts of research and doctor recommendations. Therapeutic is defined as "having healing or curative powers." See *Lonza, Inc. v. U.S.*, 46 F. 3d 1098 (Fed.Cir. 1995) The common meaning for prophylactic is "preventative". Webster's Third New International Dictionary defines prophylactic as "(1) guarding from disease: preventing or contributing to the prevention of disease (2) tending to prevent or ward off."

It may well be that CS has therapeutic or prophylactic use. However, to the extent health care professionals suggest using CS, or

specifically LMWCS, these recommendations are no different from recommending a healthy diet to "treat" coronary artery disease, eating a hard candy to "treat" low blood sugar associated with the administration of insulin, or taking vitamin C to "prevent" a cold. Healthy foods, hard candy and vitamin C are not classified under subheading 3001, HTSUS, by virtue of these doctor recommendations. The fact remains that in this country, CS is marketed, used and regulated as a dietary supplement to maintain strong joints not unlike the purposes provided by any nutrient. See *H. Reisman Corp v. U.S.*, 17 CIT 1260 (1993) (the court held that Vitamin B-12 "is not used in a therapeutic or prophylactic manner beyond the purposes provided by any nutrient, including ordinary grain feed or food of any kind.") *Id.*

(6) The economic practicality of using the import as therapy or prophylaxis is not feasible as regulations preclude its being marketed as such.

(7) Our research indicates that there is no consensus that CS has prophylactic or therapeutic use, regardless of the grade or molecular weight of the product, beyond its ability to maintain healthy joints. Indeed, the NIH states that "results of previous studies in the medical literature have yielded conflicting results on the effectiveness of glucosamine and CS as effective treatments for osteoarthritis." *Questions & Answers: NIH Study on Glucosamine and Chondroitin Sulfate for Knee Osteoarthritis*, http://www.nih.gov/news/pr/sept 99/ucaam.15a.htm, p.1, Sept. 15, 2000. The imminent FDA phase III study sponsored by the NIH is needed to prove the claims of effectiveness of CS in the treatment of osteoarthritis.

Therefore, it can not be argued that CS is principally prepared, for use in the United States, as a therapeutic or prophylactic substance.

Customs, pursuant to section 19 U.S.C. 1625 (c)(1), is revoking NY A82011, dated June 20, 1996 and NY 815350, dated October 19, 1996, HQ 960053 dated October 21,1997 and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letters (HQ) 962697 and (HQ) 964373 set forth as Attachments "A" and "B", respectively. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions.

As stated in the proposed notice, this revocation will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period. Similarly, pursuant to section 1625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)),

Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the customs Bulletin.

Dated: October 10, 2000

MARVIN AMERNICK
(For John Durant, Director)
Commercial Rulings Division

[Attachments]

Attachment A

HQ 962697
October 10, 2000
CLA-2 RR:CR:GC 962697 AM
CATEGORY: CLASSIFICATION
TARIFF NO.: 3913.90.20

MR. JOSEPH J. CHIVINI
AUSTIN CHEMICAL COMPANY, INC.
1565 Barclay Blvd.
Buffalo Grove, IL 60089

Re: NY A82011and NY 815350 revoked; chondroitin sulfate imported in bulk form

Dear MR. CHIVINI:

This is in reference to your letter of March 1, 1999, to the Director, Customs National Commodity Specialist Division, concerning the classification, under the Harmonized Tariff Schedule of the United State (HTSUS), of "chondroitin sulfate highly compressible," (CS) imported in bulk form. Your letter was referred to this office for reply. We regret the delay.

In preparing our response, we have reviewed the decisions in NY A82011, issued to you on June 20, 1996, NY 815350, issued to you on October 19, 1996, and HQ 960053, which was issued by Customs Headquarters on October 21, 1997, and have determined that the classification set forth in those rulings for CS imported in bulk is in error. This ruling revokes NY A82011 and NY 815350. HQ 960053 is revoked by HQ 964373 of this date.

Pursuant to section 625 (c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of NY A82011, NY 815350, and HQ 960053 was published on August 23, 2000, in the CUSTOMS BULLETIN, Volume 34, No. 34. Five comments were received in opposition to the proposed revocation. After careful consideration of the comments, as set forth in this ruling, we have determined to proceed with the revocations.

Facts:

The substance CS imported in bulk form is a white powder "glycosaminoglycan that predominates in the ground substance of cartilage, bone, and blood vessels but also occurs in other connective tissues. It consists of repeating disaccharide units in specific linkage, each composed of a glucoronic acid residue linked to a sulfated N-acetylgalactosamine residue." Dorland's Medical Dictionary, 321 (28th Edition,W. B. Saunders Company, 1994). Furthermore, the Merck Index, §2270, 371 (12th Edition, Merck & Co., Inc., 1996) adds that "[t]hese biological polymers act as the flexible connecting matrix between the tough protein filaments in cartilage to form a polymeric system similar to reinforced rubber." *Id.* The CAS registry number assigned to CS is 12678-07-8 and it is not listed in the Chemical or Pharmaceutical Appendixes to the HTSUS.

You state that the CS that is the subject of this ruling will be used as an "intermediate in pharmaceutical research." We note that there are varying grades and types of CS. All are produced using three basic steps: extraction from animal cartilage, drying, and milling into a fine powder.

Issue:

Whether CS imported in bulk form is classified in heading 3001, HTSUS, as animal substances for therapeutic or prophylactic use, or heading 3913, HTSUS, as a naturally occuring polysaccharide.

Law and Analysis:

Merchandise imported into the U.S. is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context that requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. Additional U.S. Rule of Interpretation 1(a) requires that "a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use".

In interpreting the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUSA. *See,* T.D. 89-80, 54 Fed. Reg. 35127 (August 23, 1989).

The following headings are relevant to the classification of this product:

3001	Glands and other organs for organotherapeutic uses, dried, whether or not powdered; extracts of glands or other organs or of their secretions for organotherapeutic uses; heparin and its salts; other human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included:
* * * * * * * * * * * *	
3913	Natural polymers (for example, alginic acid) and modified natural polymers (for example, hardened proteins, chemical derivatives of natural rubber), not elsewhere specified or included, in primary forms:

In NY A82011, NY 815350, and HQ 960053, this merchandise was classified in subheading 3001.90.00, HTSUS, because it is a heparin-like substance. Chondroitin 4-Sulfate and Chondroitin 6-Sulfate are listed in the USP Dictionary of USAN and International Drug Names 1998 with a note to "see Danaparoid Sodium." Danaparoid Sodium is a mixture of the salts of heparan sulfate including 4% of chondroitin sulfate. Heading 3001, HTSUS, specifically includes heparin and the ENs for the heading describe heparin and its salts thus:

> (c) Heparin and its salts. Heparin consists of a mixture of complex organic acids (muco-polysaccharides) obtained from mammalian tissues. Its composition varies according to the origin of the tissues. Heparin and its salts are used chiefly in medicine, especially as blood anti-coagulants. They remain classified here whatever their degree of activity.

However, CS itself is not heparin and is therefore not *eo nomine* included in HTSUS heading 3001.

Furthermore, to be classifiable in heading 3001, HTSUS, an animal substance (other than glands and other organs or heparin) must be "prepared for therapeutic or prophylactic uses." By its terms, heading 3001, HTSUS, is a "use" provision. When two or more tariff categories are equally descriptive of an item, one that describes a "use" governs over one which describes the composition of the item. *Totes, Inc. v. United States*, 69 F. 3d 495 (Fed Cir. 1995) (citations omitted). It is well settled law that merchandise is classified according to its condition when imported. *United States v. Citroen*, 223 U.S. 407, 414-15, 56 L. Ed.486, 32 S. Ct. 259 (1911). If the rule were otherwise, not only could the same product be subject to different duty rates depending on its intended end use, but Customs would be flooded with affidavits or other evidence of differing intended uses. *Mita Copystar America v. The United States*, 21 F.3d 1079 (Fed. Cir. 1994). Therefore, the determinative issue is **whether CS, as imported, is principally prepared for therapeutic or prophylactic use in the U.S.**

The goods that are the subject of NY A82011 and NY 815350 are ostensibly imported for pharmaceutical research. The goods which are the subject of HQ 960053 are imported for use in animal feed. Commenters have pointed to voluminous research which shows that CS may have therapeutic properties in the treatment of joint pathologies in animals, and in osteoarthritis and heart disease in humans. Commenters have also pointed to the probable use of specially formulated low molecular weight chondroitin sulfate (LMWCS) in a National Institute of Health (NIH), Food and Drug Administration (FDA) phase III study on the treatment of osteoarthritis of the knee.

These studies do not change the fact that presently, in the U.S., CS is marketed and sold as a dietary supplement. Even specially formulated LMWCS is presently incorporated into formulations sold as dietary supplements. At this point in time, Customs can not separate out different types of CS when they are all used as a dietary supplement. (see *Mita Copystar, supra* at 1082).

In compliance with the Dietary Supplement Health and Education Act of 1994, CS preparations contain the legally required disclaimer that "the product is not intended to diagnose, treat, cure or prevent any disease." One commenter noted that not all CS products contain this disclaimer on their label. It is true that FDA regulations only require the disclaimer on products that claim to have therapeutic or prophylactic properties. Therefore, those products that do not display this disclaimer certainly are not claiming that they are prepared for use as a therapeutic or prophylactic substance.

Citing several court decisions, several commenters noted that the FDA's use of a term does not control Customs classification decisions. However, Customs is not classifying the product according to the definition of the terms "therapeutic" and "prophylactic" in FDA statutes. Rather, the FDA regulates the use of this product in the U.S. Where customs must determine whether a "use" provision applies to a substance, the controlling regulatory scheme is indeed relevant.

More importantly, the Courts have delineated some of the factors to consider in determining whether a product falls within the class or kind of a particular "use" provision. These are: (1) the general physical characteristics, (2) the expectation of the ultimate purchaser, (3) the channels of trade, (4) the environment of sale (accompanying accessories, manner of advertisement and display), (5) the use in the same manner as merchandise which defines the class, (6) the economic prac-

ticality of so using the import, and (7) the recognition in the trade of this use. See *Lenox Collections v. United States*, 19 CIT 345, 347 (1995); *Kraft, Inc, v. United States*, 16 CIT 483 (1992), *G. Heileman Brewing Co. v. United States*, 14 CIT 614 (1990); and *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F.2d 373 (1976), *cert. denied*, 429 U.S. 979 (1976).

Applying these factors, we find that they weigh overwhelmingly in favor of finding that CS is not prepared principally for use in the U.S. for therapy or prophylaxis thus:

(1) The general physical characteristics of CS is that of a mucopolysaccharide, like rubber.

One commenter claims that LMWCS is more like heparin than rubber and claims that it should be classified *nocitur a sociis* ("known by its associates") as heparin in subheading 3001, HTSUS. To bolster the argument, the commenter cites the case of *Western Dairy Products, Inc. v. the United States*, 510 F.2d 376 (1975), wherein the court found that calcium reduced dried skim milk (CRDSM) was classified as an article of milk not specially provided for, rather than as an edible product not otherwise provided for, under the Tariff Schedules of the United States (TSUS), the predecessor of the HTSUS. In that case, the court noted that the specific tariff language mandated that all articles of milk, edible or non-edible, be classified under the milk provisions. The analogy does not apply to the instant case. The tariff provision at issue here does not suggest an intent that all articles similar to heparin be classified in this provision. Moreover, CS is not like heparin in the ways that CRDSM is like milk. CRDSM, like the *eo nomine* yogurt and whey of the heading in the TSUS, is made from milk that has been modified by a chemical change. Heparin is derived from animal livers or lungs. Hawley's Condensed Chemical Dictionary, 592 (11th Edition, Van Nostrand Reinhold Co., Inc., 1987). CS is derived from animal cartilage. CS is not a modified heparin. The case cited and theory of *nocitur a sociis* is therefore irrelevant to our determination of the proper classification of CS.

(2) The expectation of the ultimate purchaser is that CS increases the general health of their bones and joints and may treat joint ailments through the same mechanism that it improves joint function generally.

(3) The channels of trade and environment of sale is through health food stores and pharmacies shelved with the dietary supplements. One can also purchase the product electronically on the internet through web sites promoting natural products for maintaining general good health. Products containing LMWCS are available from a pharmacy but no prescription is needed to obtain them and their package includes the FDA disclaimer mandated for dietary supplements.

(4) The product is advertised as a substance which maintains healthy joints.

(5) The product is used as a dietary supplement. One commenter argued that CS is "prepared" for use as a therapeutic or prophylactic agent in a similar manner as tomatoes were "prepared" for use as a tomato sauce in *Orlando Food Corp. V. United States*, 140 F.3d 1437 (Fed. Cir. 1998). There the issue was whether canned tomatoes prepared with tomato puree, basil, salt and citric acid were classifiable under the HTSUS as "prepared tomatoes" or as tomatoes "prepared for sauce". The court noted that the tomatoes were specifically prepared for sauce because the product was used "solely as an advanced base or preparation for sauces." The court classified the tomatoes at issue under the more specific "use" provision.

In the instant case, we do not believe that CS is described within the text of heading 3001, HTSUS, the more specific "use" provision. Unlike in *Orlando, supra*, the substance is not prepared for a sole use. The basic preparatory steps in the manufacture of the CS, extraction from animal cartilage, drying, and milling into a fine powder, occur whether or not the CS is being used as a dietary supplement. The very same CS which is sold as a dietary supplement may currently be recommended for use to "treat" osteoarthritis. Thus, *Orlando, supra* does not apply to the instant case.

Several commenters noted that CS has therapeutic and prophylactic use as witnessed by copious amounts of research and doctor recommendations. Therapeutic is defined as "having healing or curative powers." See *Lonza, Inc. v. U.S.*, 46 F. 3d 1098 (Fed.Cir. 1995) The common meaning for prophylactic is "preventative". Webster's Third New International Dictionary defines prophylactic as "(1) guarding from disease: preventing or contributing to the prevention of disease (2) tending to prevent or ward off."

It may well be that CS has therapeutic or prophylactic use. However, to the extent health care professionals suggest using CS, or specifically LMWCS, these recommendations are no different from recommending a healthy diet to "treat" coronary artery disease, eating a hard candy to "treat" low blood sugar associated with the administration of insulin, or taking vitamin C to "prevent" a cold. Healthy foods, hard candy and vitamin C are not classified under subheading 3001, HTSUS, by virtue of these doctor recommendations. The fact remains that in this country, CS is marketed, used and regulated as a dietary supplement to maintain strong joints not unlike the purposes provided by any nutrient. See *H. Reisman Corp v. U.S.*, 17 CIT 1260 (1993) (the court held that Vitamin B-12 "is not used in a therapeutic or prophylactic manner beyond the purposes provided by any nutrient, including ordinary grain feed or food of any kind.") *Id.*

(6) The economic practicality of using the import as therapy or prophylaxis is not feasible as regulations preclude its being marketed as such.

(7) Our research indicates that there is no consensus that CS has prophylactic or therapeutic use, regardless of the grade or molecular weight of the product, beyond its ability to maintain healthy joints. Indeed, the NIH states that "results of previous studies in the medical literature have yielded conflicting results on the effectiveness of glucosamine and CS as effective treatments for osteoarthritis." *Questions & Answers: NIH Study on Glucosamine and Chondroitin Sulfate for Knee Osteoarthritis*, http://www.nih.gov/news/pr/sept 99/ucaam.15a.htm, p.1, Sept. 15, 2000. The imminent FDA phase III study sponsored by the NIH is needed to prove the claims of effectiveness of CS in the treatment of osteoarthritis.

Therefore, it can not be argued that CS is principally prepared, for use in the United States, as a therapeutic or prophylactic substance.

Holding:

CS is classified in subheading 3913.90.20, HTSUS, the provision for "[N]atural polymers . . .: [O]ther: [P]olysaccharides and their derivatives."

Effect On Other Rulings:

NY A82011, dated June 20, 1996 and NY 815350, dated October 19, 1996, are revoked. HQ 960053, dated October 21, 1997, is revoked by HQ 964373 of this date.

MARVIN AMERNICK
(For John Durant, Director)
Commercial Rulings Division

ATTACHMENT B

HQ 964373
October 10, 2000
CLA-2 RR:CR:GC 964373 AM
CATEGORY: CLASSIFICATION
TARIFF NO.: 3913.90.20

MR. RICHARD A. MERRINER
RICHDEL, INC.
P.O. Box 1968
Carson City, NV 89702

Re: HQ 960053 revoked; chondroitin sulfate imported in bulk form

Dear MR. MERRINER:

This is in reference to HQ 960053 issued on October 21, 1997, concerning the classification, under the Harmonized Tariff Schedule of the United States, of sodium chondroitin sulfate (CS) imported in bulk.

We have reviewed the decision in HQ 960053, as well as decisions in NY A82011, issued on June 20, 1996, and NY 815350, issued on October 19, 1996, and have determined that the classification set forth in those rulings for CS imported in bulk form is in error. This ruling revokes HQ 960053. NY A82011 and NY 815350 are revoked in HQ 962697 of this date.

Pursuant to section 625 (c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of NY A82011, NY 815350, and HQ 960053 was published on August 23, 2000, in the CUSTOMS BULLETIN, Volume 34, No. 34. Five comments were received in opposition to the proposed revocation. After careful consideration of the comments, as set forth in this ruling, we have determined to proceed with the revocations.

Facts:

The substance CS imported in bulk form is a white powder "glycosaminoglycan that predominates in the ground substance of cartilage, bone, and blood vessels but also occurs in other connective tissues. It consists of repeating disaccharide units in specific linkage, each composed of a glucoronic acid residue linked to a sulfated N-acetylgalactosamine residue." Dorland's Medical Dictionary, 321 (28th Edition,W. B. Saunders Company, 1994). Furthermore, the Merck Index, §2270, 371 (12th Edition, Merck & Co., Inc., 1996) adds that "[t]hese biological polymers act as the flexible connecting matrix between the tough protein filaments in cartilage to form a polymeric system similar to reinforced rubber." *Id.* The CAS registry number assigned to CS is 12678-07-8 and it is not listed in the Chemical or Pharmaceutical Appendixes to the HTSUS.

You state that the CS that is the subject of this ruling will be used as an additive to animal feed. We note that there are varying grades and types of CS. All are produced using three basic steps: extraction from animal cartilage, drying, and milling into a fine powder.

Issue:

Whether CS imported in bulk form is classified in heading 3001, HTSUS, as animal substances for therapeutic or prophylactic use, or heading 3913, HTSUS, as a naturally occuring polysaccharide.

Law and Analysis:

Merchandise imported into the U.S. is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context that requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law.

GRI 1 requires that classification be determined first according to the terms of

the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. Additional U.S. Rule of Interpretation 1(a) requires that "a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use".

In interpreting the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUSA. *See*, T.D. 89-80, 54 Fed. Reg. 35127 (August 23, 1989).

The following headings are relevant to the classification of this product:

3001 Glands and other organs for organotherapeutic uses, dried, whether or not powdered; extracts of glands or other organs or of their secretions for organotherapeutic uses; heparin and its salts; other human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included:

* * * * * * * * * * * *

3913 Natural polymers (for example, alginic acid) and modified natural polymers (for example, hardened proteins, chemical derivatives of natural rubber), not elsewhere specified or included, in primary forms:

In NY A82011, NY 815350, and HQ 960053, this merchandise was classified in subheading 3001.90.00, HTSUS, because it is a heparin-like substance. Chondroitin 4-Sulfate and Chondroitin 6-Sulfate are listed in the USP Dictionary of USAN and International Drug Names 1998 with a note to "see Danaparoid Sodium." Danaparoid Sodium is a mixture of the salts of heparan sulfate including 4% of chondroitin sulfate. Heading 3001, HTSUS, specifically includes heparin and the ENs for the heading describe heparin and its salts thus:

(c) Heparin and its salts. Heparin consists of a mixture of complex organic acids (muco-polysaccharides) obtained from mammalian tissues. Its composition varies according to the origin of the tissues. Heparin and its salts are used chiefly in medicine, especially as blood anti-coagulants. They remain classified here whatever their degree of activity.

However, CS itself is not heparin and is therefore not *eo nomine* included in HTSUS heading 3001.

Furthermore, to be classifiable in heading 3001, HTSUS, an animal substance (other than glands and other organs or heparin) must be "prepared for therapeutic or prophylactic uses." By its terms, heading 3001, HTSUS, is a use provision. When two or more tariff categories are equally descriptive of an item, one that describes a use governs over one which describes the composition of the item. *Totes, Inc. v. United States*, 69 F. 3d 495 (Fed Cir. 1995) (citations omitted). It is well settled law that merchandise is classified according to its condition when imported. *United States v. Citroen*, 223 U.S. 407, 414-15, 56 L. Ed.486, 32 S. Ct. 259 (1911). If the rule were otherwise, not only could the same product be subject to different duty rates depending on its intended end use, but Customs would be flooded with affidavits or other evidence of differing intended uses. *Mita Copystar America v. The United States*, 21 F.3d 1079 (Fed. Cir. 1994). Therefore, the determinative issue is **whether CS, as imported, is principally prepared for therapeutic or prophylactic use in the U.S.**

The goods that are the subject of HQ 960053 are imported for use in animal feed. The goods that are the subject of NY A82011 and NY 815350 are ostensibly imported for pharmaceutical research. Commentators have pointed to voluminous research which shows that CS may have therapeutic properties in the treatment of joint pathologies in animals, and in osteoarthritis and heart disease in humans. Commentators have also pointed to the probable use of specially formulated low molecular weight chondroitin sulfate (LMWCS) in a National Institute of Health (NIS), Food and Drug Administration (FDA) phase III study on the treat-

ment of osteoarthritis of the knee.

These studies do not change the fact that presently, in the U.S., CS is marketed and sold as a dietary supplement. Even specially formulated LMWCS is presently incorporated into formulations sold as dietary supplements. At this point in time, Customs can not separate out different types of CS when they are all used as a dietary supplement. (see *Mita Copystar, supra* at 1082).

In compliance with the Dietary Supplement Health and Education Act of 1994, CS preparations contain the legally required disclaimer that "the product is not intended to diagnose, treat, cure or prevent any disease." One commentator noted that not all CS products contain this disclaimer on their label. It is true that FDA regulations only require the disclaimer on products that claim to have therapeutic or prophylactic properties. Therefore, those products that do not display this disclaimer certainly are not claiming that they are prepared for use as a therapeutic or prophylactic substance.

Citing several court decisions, several commentators noted that the FDA's use of a term does not control Customs classification decisions. However, Customs is not classifying the product according to the definition of the terms "therapeutic" and "prophylactic" in FDA statutes. Rather, the FDA regulates the use of this product in the U.S. Where customs must determine whether a use provision applies to a substance, the controlling regulatory scheme is indeed relevant.

More importantly, the Courts have delineated some of the factors to consider in determining whether a product falls within the class or kind of a particular use provision. These are: (1) the general physical characteristics, (2) the expectation of the ultimate purchaser, (3) the channels of trade, (4) the environment of sale (accompanying accessories, manner of advertisement and display), (5) the use in the same manner as merchandise which defines the class, (6) the economic practicality of so using the import, and (7) the recognition in the trade of this use. See *Lenox Collections v. United States*, 19 CIT 345, 347 (1995); *Kraft, Inc, v. United States*, 16 CIT 483 (1992), *G. Heileman Brewing Co. v. United States*, 14 CIT 614 (1990); and *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F.2d 373 (1976), *cert. denied*, 429 U.S. 979 (1976).

Applying these factors, we find that they weigh overwhelmingly in favor of finding that CS is not prepared principally for use in the U.S. for therapy or prophylaxis thus:

(1) The general physical characteristics of CS is that of a mucopolysaccharide, like rubber.

One commentator claims that LMWCS is more like heparin than rubber and claims that it should be classified *nocitur a sociis* ("known by its associates") as heparin in subheading 3001, HTSUS. To bolster the argument, the commentator cites the case of *Western Dairy Products, Inc. v. the United States*, 510 F.2d 376 (1975), wherein the court found that calcium reduced dried skim milk (CRDSM) was classified as an article of milk not specially provided for, rather than as an edible product not otherwise provided for, under the Tariff Schedules of the United States, TSUS, the predecessor of the HTSUS. In that case, the court noted that the specific tariff language mandated that all articles of milk, edible or non-edible, be classified under the milk provisions. The analogy does not apply to the instant case. The tariff provision at issue here does not suggest an intent that all articles similar to heparin be classified in this provision. Moreover, CS is not like heparin in the ways that CRDSM is like milk. CRDSM, like the *eo nomine* yogurt and whey of the heading in the TSUS, is made from milk that has been modified by a chemical change. Heparin is derived from animal livers or lungs. Hawley's Condensed Chemical Dictionary, 592 (11th Edition, Van Nostrand Reinhold Co. Inc., 1987). CS is derived from animal cartilage. CS is not a modified heparin. The case cited and theory of *nocitur a sociis* is therefore irrelevant to our determination of the proper classification of CS.

(2) The expectation of the ultimate purchaser is that CS increases the general health of their bones and joints and may treat joint ailments through the same mechanism that it improves joint function generally.

(3) The channels of trade and environment of sale is through health food stores and pharmacies shelved with the dietary supplements. One can also

purchase the product electronically on the internet through web sites promoting natural products for maintaining general good health. Products containing LMWCS are available from behind the pharmacy counter but no prescription is needed to obtain them and their package includes the FDA disclaimer mandated for dietary supplements.

(4) The product is advertised as a substance which maintains healthy joints.

(5) The product is used as a dietary supplement. One commentator argued that CS is "prepared" for use as a therapeutic or prophylactic agent in a similar manner as tomatoes were "prepared" for use as a tomato sauce in *Orlando Food Corp. V. United States*, 140 F.3d 1437 (Fed. Cir. 1998). There the issue was whether canned tomatoes prepared with tomato puree, basil, salt and citric acid were classifiable under the HTSUS as "prepared tomatoes" or as tomatoes "prepared for sauce". The court noted that the tomatoes were specifically prepared for sauce because the product was used "solely as an advanced base or preparation for sauces." The court classified the tomatoes at issue under the more specific use provision.

In the instant case, we do not believe that CS is described within the text of heading 3001, HTSUS, the more specific use provision. Unlike in *Orlando, supra*, the substance is not prepared for a sole use. The basic preparatory steps in the manufacture of the CS, extraction from animal cartilage, drying, and milling into a fine powder, occur whether or not the CS is being used as a dietary supplement. The very same CS which is sold as a dietary supplement may currently be recommended for use to "treat" osteoarthritis. Thus, *Orlando, supra* does not apply to the instant case.

Several commentators noted that CS has therapeutic and prophylactic use as witnessed by copious amounts of research and doctor recommendations. Therapeutic is defined as "having healing or curative powers." See *Lonza, Inc. v. U.S.*, 46 F. 3d 1098 (Fed.Cir. 1995) The common meaning for prophylactic is "preventative". Webster's Third New International Dictionary defines prophylactic as "(1) guarding from disease: preventing or contributing to the prevention of disease (2) tending to prevent or ward off."

It may well be that CS has therapeutic or prophylactic use. However, to the extent health care professionals suggest using CS, or specifically LMWCS, these recommendations are no different from recommending a healthy diet to "treat" coronary artery disease, eating a hard candy to "treat" low blood sugar associated with the administration of insulin, or taking vitamin C to "prevent" a cold. Healthy foods, hard candy and vitamin C are not classified under subheading 3001, HTSUS, by virtue of these doctor recommendations. The fact remains that in this country, CS is marketed, used and regulated as a dietary supplement to maintain strong joints not unlike the purposes provided by any nutrient. See *H. Reisman Corp v. U.S.*, 17 CIT 1260 (1993) (the court held that Vitamin B-12 "is not used in a therapeutic or prophylactic manner beyond the purposes provided by any nutrient, including ordinary grain feed or food of any kind.") *Id.*

(6) The economic practicality of using the import as therapy or prophylaxis is not feasible as regulations preclude its being marketed as such.

(7) Our research indicates that there is no consensus in the field that CS has prophylactic or therapeutic use, regardless of the grade or molecular weight of the product, beyond its ability to maintain healthy joints. Indeed, the NIH states that "results of previous studies in the medical literature have yielded conflicting results on the effectiveness of glucosamine and CS as effective treatments for osteoarthritis." *Questions & Answers: NIH Study on Glucosamine and Chondroitin Sulfate for Knee Osteoarthritis*, http://www.nih.gov/news/pr/sept 99/ucaam.15a.htm, p.1, Sept. 15, 2000. The imminent FDA phase III study sponsored by the NIH is needed to prove the claims of effectiveness of CS in the treatment of osteoarthritis.

Therefore, it can not be argued that CS is principally prepared, for use in the United States, as a therapeutic or prophylactic substance.

Holding:

CS is classified in subheading 3913.90.20, HTSUS, the provision for "[N]atural polymers . . .: [O]ther: [P]olysaccharides and their derivatives."

Effect On Other Rulings:

HQ 960053, dated October 21,1997, is hereby revoked. NY A82011 and NY 815350 are revoked by HQ 962697 of this date.

MARVIN AMERNICK
(For John Durant, Director)
Commercial Rulings Division

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF GUITAR TUNERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of a ruling letter and treatment relating to the tariff classification of guitar tuners.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS), of guitar tuners and any treatment previously accorded by the Customs Service to substantially identical transactions. Notice of the proposed revocation was published on August 30, 2000, in Vol. 34, No. 35, of the *Customs Bulletin*. One comment was received.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after October 25, 2000.

FOR FURTHER INFORMATION CONTACT: Keith Rudich, Commercial Rulings Division, (202) 927-2391.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "in-

formed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published on August 30, 2000, in the *Customs Bulletin*, Vol. 34, No. 35, proposing to revoke one ruling PD C80205, dated October 15, 1997, and revoke the tariff treatment pertaining to the tariff classification of guitar tuners. One comment was received in response to this notice.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise that may exist but which have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's failure to have advised the Customs Service of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking PD C80205, dated October 15, 1997, and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 964264. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to sub-

stantially identical transactions. HQ 964264, revoking PD C80205, and revoking its treatment relating to tariff classification, is set forth as the "Attachment" to this document.

In accordance wit 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

Dated: October 5, 2000

MARVIN AMERNICK
(For John Durant, Director,)
Commercial Rulings Division

[Attachment]

Attachment

HQ 964264
October 5, 2000
CLA-2 RR:CR:GC 964264 KBR
CATEGORY: Classification
TARIFF NO.: 9031.80.80.

DENNIS HECK, IMPORT COMPLIANCE MANAGER
YAMAHA CORPORATION OF AMERICA
6600 Orangethorpe Avenue, P.O. Box 6600
Buena Park, CA 90622-6600

Re: Revocation of PD C80205; Musical Instrument Tuners

Dear Mr. Heck:

This is in regard to your letter dated May 12, 2000, requesting a ruling as to the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of electronic musical instrument tuners, models YT 150, 240, 250 and TD series. You cite a previous ruling, PD C80205, issued to you on October 15, 1997, by the Port Director, Washington, D.C., concerning the classification for guitar tuners. We have reviewed the prior ruling and have determined that the classification provided is incorrect. Pursuant to sections 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the Norht American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), a notice was published on August 30, 2000, in Vol. 34, No. 35 of the Customs Bulletin, proposing to revoke PD C80205 concerning guitar tuners. Your comment was the only one received in response to this notice. This ruling revokes PD C80205 by providing the correct classification for musical instrument tuners.

Facts:

The merchandise consists of electronic musical instrument tuners. Some of the tuners are specifically designed to tune acoustic, electric or bass guitars; some tuners are designed specifically for wind instruments; and some tuners may be used for any instrument. All the tuners operate in a similar manner, allowing a musician to tune an instrument by having the tuner sense the pitch (frequency) of a note played by the instrument and displaying if it is sharp or flat on a LCD VU meter and LED lights.

The articles at issue in PD C80205 were battery operated guitar tuners that measured or checked the pitch (frequency) of the sound produced by vibrating

guitar strings. The sound received by a built in microphone would be compared to a selected standard and a VU meter or LED lights would display the variance. Customs determined that the guitar tuner should be classified in subheading 9027.80.4560, HTSUS, which provides for Instruments and apparatus for physical or chemical analysis (for example, polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion, surface tension or the like; instruments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters); microtomes; parts and accessories thereof: Other instruments and apparatus: Other: Electrical: Physical analysis instruments and apparatus.

However, in NY 869148, dated December 19, 1991, Customs determined that battery operated, hand held tuners for both acoustic and electronic instruments, should be classified in subheading 9031.80.0080 [typographical error, should have read 9031.80.8000], HTSUS, which provides for Measuring or checking instruments, appliances and machines not specified or included elsewhere in this chapter; profile projectors; parts and accessories thereof: Other instruments, appliances and machines: Other.

In your comment to the Customs Bulletin notice of proposed revocation, you submitted definitions including sound, tone, pitch, and vibration. You also submitted instruction manuals for the use of Yamaha instrument tuners.

Issue:

Whether instrument tuners are properly classifiable under heading 9027, HTSUS, or under heading 9031, HTSUS.

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that classification is determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI.

In interpreting the headings and subheadings, Customs looks to the Harmonized Commodity Description and Coding System Explanatory Notes (ENs). Although not legally binding, they provide a commentary on the scope of each heading of the HTSUS. It is Customs practice to follow, whenever possible, the terms of the ENs when interpreting the HTSUS. See T.D. 89-90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are:

9027	Instruments and apparatus for physical or chemical analysis (for example, polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion, surface tension or the like; insturments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters); microtomes; parts and accessories thereof:
*	* * * * *
9027.80	Other instruments and apparatus:
*	* * * * *
	Other:
9027.80.45	Electrical
	and
9031	Measuring or checking instruments, appliances and machines not specified or included elsewhere in this chapter; profile projectors; parts and accessories thereof:

* * * * *

9031.80 Other instruments, appliances and machines:

* * * * *

9031.80.80 Other.

Heading 9027, HTSUS, includes in particular "instruments and apparatus for measuring or checking quantities of heat, sound or light...." We do not find that heading 9027 applies to musical instrument tuners. A tuner measures pitch, frequency or vibration. We believe this to be more of a "quality" than a "quantity". Measuring a quantity of sound is done by measuring the decibels or loudness of the sound. A machine measuring the decibels an instrument produces would be classified within heading 9027, HTSUS.

Heading 9031, HTSUS, includes measuring or checking instruments. EN 18 for heading 9031, HTSUS, notably includes "Apparatus for measuring or detecting vibrations, expansion, shock or jarring, used on machines, bridges, dams, etc." Since an instrument turner measures the vibrations emanating from a musical machine, we find this EN to be instructive. In NY 869148 (December 19, 1991), Customs found that the correct classification for an instrument tuner was within subheading 9031.80.80, HTSUS. Likewise, we find that the proper classification for the imported electronic musical instrument tuners and wind instrument tuners instrument tuners is in subheading 9031.80.80, HTSUS.

In your comment you point to EN paragraph (29) for Heading 9027, HTSUS, arguing that spectrophotometers are analogous to your instrument tuners. However, we note that according to *The New Encyclopaedia Britannica, Macropaedia,* Vol. 17 (1975) at 458, "A spectrophotometer is a spectrometer used to record *QUANTITATIVELY* the *AMOUNT* of light emitted or absorbed by a sample of material according to the wavelength." (emphasis added) Therefore, we find a distinction between that article and the Yamaha instrument tuners. The instrument tuners are not measuring "quantitatively" the "amount" of sound.

Customs considered whether chapter 92, HTSUS, which provides for Musical instruments; parts and accessories of such articles, described the subject musical instrument tuners. However, we found that this chapter was not applicable. Chapter note 1(b) to chapter 92, states that "[m]icrophones, amplifiers, loudspeakers, headphones, switches, stroboscopes or other accessory instruments, apparatus or equipment of chapter 85 or 90, for use with but not incorporated in or housed in the same cabinet as the instruments of this chapter" will not be covered by chapter 92. Therefore, since the instrument tuners are articles which fall within chapter 90 but are separate articles not housed or incorporated within the instrument itself, we find chapter 92 to be inapplicable.

Holding:

The imported electronic musical instrument tuners and wind instrument tuners are classifiable in subheading 9031.80.80, HTSUS, as other measuring or checking instruments, appliances and machines not specified or included elsewhere in this chapter.

Effect On Other Ruling:

PD C80205, dated October 15, 1997, is hereby **REVOKED**. In accordance with 19 U.S.C § 1625(c), this ruling will become effective sixty (60) days after its publication in the Customs Bulletin.

MARVIN AMERNICK
(For John Durant, Director)
Commercial Rulings Division

DATES AND DRAFT AGENDA OF THE TWENTY-SIXTH SESSION OF THE HARMONIZED SYSTEM COMMITTEE OF THE WORLD CUSTOMS ORGANIZATION

AGENCIES: U.S. Customs Service, Department of the Treasury, and U.S. International Trade Commission.

ACTION: Publication of the dates and draft agenda for the twenty-sixth session of the Harmonized System Committee of the World Customs Organization.

SUMMARY: This notice sets forth the dates and draft agenda for the next session of the Harmonized System Committee of the World Customs Organization.

FOR FURTHER INFORMATION CONTACT: Myles B. Harmon, Director, International Agreements Staff, U.S. Customs Service (202-927-2255), or Eugene A. Rosengarden, Director, Office of Tariff Affairs and Trade Agreements, U.S. International Trade Commission (202-205-2592).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The United States is a contracting party to the International Convention on the Harmonized Commodity Description and Coding System ("Harmonized System Convention"). The Harmonized Commodity Description and Coding System ("Harmonized System"), an international nomenclature system, form the core of the U.S. tariff, the Harmonized Tariff Schedule of the United States. The Harmonized System Convention is under the jurisdiction of the World Customs Organization (established as the Customs Cooperation Council).

Article 6 of the Harmonized System Convention establishes a Harmonized System Committee ("HSC"). The HSC is composed of representatives from each of the contracting parties to the Harmonized System Convention. The HSC's responsibilities include issuing classification decisions on the interpretation of the Harmonized System. Those decisions may take the form of published tariff classification opinions concerning the classification of an article under the Harmonized System or amendments to the Explanatory Notes to the Harmonized System. The HSC also considers amendments to the legal text of the Harmonized System. The HSC meets twice a year in Brussels, Belgium. The next session of the HSC will be the twenty-sixth, and it will be held from November 13 to 24, 20000.

In accordance with section 1210 of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100-418), the Department of the Treasury, represented by the U.S. Customs Service, the Department of Commerce, represented by the Census Bureau, and the U.S. International Trade Commission ("ITC"), jointly represent the U.S. govern-

ment at the sessions of the HSC. The Customs Service representative serves as the head of the delegation at the sessions of the HSC.

Set forth below is the draft agenda for the next session of the HSC. Copies of available agenda-item documents may be obtained from either the Customs Service or the ITC. Comments on agenda items may be directed to the above-listed individuals.

DATED: October 6, 2000

MYLES B. HARMON,
Director
International Agreements Staff

[Attachment]

DRAFT AGENDA FOR THE 26th SESSION OF THE HARMONIZED SYSTEM COMMITTEE

Monday, 13 November 2000 (10 a.m.) to Friday, 24 November 2000

N. B. : Questions under Agenda Item VI will be examined first by the presessional Working Party (from Wednesday 8 to Friday 10 November 2000).

I. *ADOPTION OF THE AGENDA*

Draft Agenda NC0257E1
Draft Timetable NC0258B1

II. *REPORT BY THE SECRETARIAT*

1. Position regarding Contracting Parties to the HS Convention and related matters NC0259E1
2. Report on the meetings of the Policy Commission (43 rd Session) and the Council (95th and 96th Sessions) NR0105E1
3. Approval of decisions taken by the Harmonized System Committee at its 25th Session ..... NG0018E1 ..... NC0261E1
4. Technical assistance activities of the Nomenclature and Classification Sub-Directorate NC0262E1
5. Co-operation with other international organisations NC0263E1
6. Co-operation with the Technical Committee on Rules of Origin NC0264E1
7. Development of HS audio-visual training materials NC0265E1
8. Publication of the Classification Handbook NC0266E1
9. New information provided on the WCO Web site NC0312E1
10. Other

III. *GENERAL QUESTIONS*

1. Development of Correlation Tables NC0267E1
2. The application of Harmonized System Committee decisions NC0268E1
3. Corrigendum amendments to the Article 16 Recommendation of 25 June 1999 ..... NC0269E1
4. Use of information technology to speed-up decision by the Harmonized System Committee NC0313E1

IV. *RECOMMENDATIONS*

1. Draft Recommendation of the Customs Co-operation Council on the insertion in national statistical nomenclatures of subheadings to facilitate the monitoring and control of products specified in the draft Protocol concerning firearms covered by the UN Convention against transnational organized crime NC0270E1

V. *REPORT OF THE HS REVIEW SUB-COMMITTEE*

1. Report of the 22nd Session of the HS Review Sub-Committee ..... NR.....
2. Matters for decision by the Harmonized System Committee NC0271E1

VI. *REPORT OF THE PRESESSIONAL WORKING PARTY*

1. Amendments to the Explanatory Notes arising from the classification of uncooked pizza in heading 19.01 ..... NC0272E1
2. Amendments to the Compendium of Classification Opinions arising from the classification of certain special textile yarns in heading 56.06 ..... NC0273E1
3. Amendments to the Compendium of Classification Opinions arising from the classification of lumbar support belts in subheading 6212.90 ..... NC0274E1

VII. *FURTHER STUDIES*

VIII. *NEW QUESTIONS*

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Anquilino, Jr.
Richard W. Goldberg
Donald C. Payne
Evan J. Wallach
Judith M. Barzilay
Delissa Ann Ridgway

Senior Judges

James L. Watson
Hebert N. Maletz
Nicholas Tsoucalas
R. Kenton Musgrave

Clerk

Leo M. Gordon

Decisions of the United States Court of International Trade

(Slip Op. 00-106)

SKF USA INC. AND SKF SVERIGE AB, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND THE TORRINGTON COMPANY, DEFENDANT-INTERVENOR

Court No. 99-08-00470

Before: NICHOLAS TSOUCALAS, *Senior Judge*

Plaintiffs, SKF USA Inc. and SKF Sverige AB (collectively "SKF"), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the United States Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*, 64 Fed. Reg. 35,590 (July 1, 1999). Specifically, SKF contends that Commerce unlawfully: (1) conducted a duty absorption inquiry under 19 U.S.C. § 1675(a)(4) (1994) for the subject reviews of the applicable antidumping duty orders covering antifriction bearings from Sweden; (2) determined that it applied a reasonable duty absorption methodology and that duty absorption had in fact occurred; and (3) excluded below-cost sales from the profit calculation for constructed value under 19 U.S.C. § 1677b(e)(2) (1994).

Held:

SKF's USCIT R. 56.2 motion is denied in part and granted in part. The case is remanded to Commerce to annul all findings and conclusions made pursuant to the duty absorption inquiry conducted for the subject reviews.? Court No. 99-08-00470 [SKF's motion is denied in part and granted in part. Case remanded.]

(Dated: August 23, 2000)

Steptoe & Johnson LLP (*Herbert C. Shelley* and *Alice A. Kipel*) for plaintiffs.
David W. Ogden, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice

(*Velta A. Melnbrencis*, Assistant Director); of counsel: *John F. Koeppen* and *David R. Mason*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

Stewart and Stewart (*Terence P. Stewart*, *Wesley K. Caine*, *Geert De Prest* and *Lane S. Hurewitz*) for defendant-intervenor.

OPINION

TSOUCALAS, *Senior Judge*: Plaintiffs, SKF USA Inc. and SKF Sverige AB (collectively "SKF"), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the United States Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 64 Fed. Reg. 35,590 (July 1, 1999).

BACKGROUND

This case concerns the ninth administrative review of the outstanding 1989 antidumping duty orders on antifriction bearings (other than tapered roller bearings) and parts thereof ("AFBs") imported from Sweden for the period of review ("POR") covering May 1, 1997 through April 30, 1998. *See Final Results*, 64 Fed. Reg. at 35,590; *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings and Parts Thereof From Sweden*, 54 Fed. Reg. 20,907 (May 15, 1989). In accordance with 19 C.F.R. § 351.213 (1998), Commerce initiated the administrative reviews of these orders on June 29, 1998, *see Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 63 Fed. Reg. 35,188, and published the preliminary results of the subject reviews on February 23, 1999, *see Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Rescission of Administrative Reviews* ("*Preliminary Results*"), 64 Fed. Reg. 8790. Commerce published the *Final Results* on July 1, 1999. *See* 64 Fed. Reg. at 35,590.

Since the administrative reviews at issue were initiated after December 31, 1994, the applicable law in this case is the antidumping statute as amended by the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (1994) (effective Jan. 1, 1995).

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a) (1994) and 28 U.S.C. § 1581(c) (1994).

STANDARD OF REVIEW

In reviewing a challenge to Commerce's final determination in an

antidumping administrative review, the Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994); *see NTN Bearing Corp. of America v. United States*, 24 CIT ___, ___, 104 F. Supp. 2d 110, 115-16 (2000) (detailing Court's standard of review for antidumping proceedings).

DISCUSSION

I. *Duty Absorption Inquiry*

A. *Background*

Title 19, United States Code, § 1675(a)(4) (1994) provides that during an administrative review initiated two or four years after the "publication" of an antidumping duty order, Commerce, if requested by a domestic interested party, "shall determine whether antidumping duties have been absorbed by a foreign producer or exporter subject to the order if the subject merchandise is sold in the United States through an importer who is affiliated with such foreign producer or exporter." Section 1675(a)(4) further provides that Commerce shall notify the International Trade Commission ("ITC") of its findings regarding such duty absorption for the ITC to consider in conducting a five-year ("sunset") review under 19 U.S.C. § 1675(c), and the ITC will take such findings into account in determining whether material injury is likely to continue or recur if an order were revoked under § 1675(c). *See* 19 U.S.C. § 1675a(a)(1)(D) (1994).

On May 29, 1998 and July 29, 1998, Torrington requested that Commerce conduct a duty absorption inquiry pursuant to § 1675(a)(4) with respect to various respondents, including SKF, to ascertain whether antidumping duties had been absorbed during the ninth POR. *See Final Results*, 64 Fed. Reg. at 35,600.

In the *Final Results*, Commerce determined that duty absorption had in fact occurred for the ninth review. *See id.* at 35,591, 35,600-02. In asserting authority to conduct a duty absorption inquiry under § 1675(a)(4), Commerce first explained that for "transition orders" as defined in § 1675(c)(6)(C) (that is, antidumping duty orders, *inter alia*, deemed issued on January 1, 1995), regulation 19 C.F.R. § 351.213(j) provides that Commerce will make a duty absorption inquiry, if requested, for any antidumping administrative review initiated in 1996 or 1998. Commerce concluded that (1) because the antidumping duty orders on the AFBs in this case have been in effect since 1989, the orders are transition orders pursuant to § 1675(c)(6)(C), and (2) since this review was initiated in 1998 and a request was made, it had the authority to make a duty absorption inquiry for the ninth POR. *See id.*

B. *Contentions of the Parties*

SKF contends that Commerce lacked authority under § 1675(a)(4) to conduct a duty absorption inquiry for the ninth POR of the outstanding 1989 antidumping duty orders. *See* SKF's Br. Supp. Mot. J.

Agency R. at 2, 9-16 ("SKF's Br."); SKF's Reply Br. at 2-30. In the alternative, SKF asserts that even if Commerce possessed the authority to conduct such an inquiry, Commerce's methodology for determining duty absorption was contrary to law and, accordingly, the case should be remanded to Commerce to reconsider its methodology. *See* SKF's Br. at 3, 16-35; SKF's Reply Br. at 31-42.

Commerce argues that it: (1) properly construed subsections (a)(4) and (c) of § 1675 as authorizing it to make a duty absorption inquiry for antidumping duty orders that were issued and published prior to January 1, 1995; and (2) devised and applied a reasonable methodology for determining duty absorption. *See* Def.'s Mem. in Opp'n to Pls.' Mot. J. Agency R. at 2, 5-24 ("Def's Br."). Also, Commerce asserts that no statutory provision or legislative history specifically provides that Commerce is "precluded" from conducting a duty absorption inquiry with respect to merchandise covered by a transition order. *See id.* at 2.

The Torrington Company ("Torrington") generally agrees with Commerce's contentions. *See* Torrington's Resp. to Pls.' Mot. J. Agency R. at 2-4, 7-41 ("Torrington's Resp."). In addition, Torrington asserts that Commerce has the "inherent" authority, aside from § 1675(a)(4), to conduct a duty absorption inquiry in any administrative review. *See id.* at 3, 30-37.

C. *Analysis*

In *SKF USA Inc. v. United States*, 24 CIT __, 94 F. Supp. 2d 1351 (2000), this Court determined that Commerce lacked statutory authority under § 1675(a)(4) to conduct a duty absorption inquiry for antidumping duty orders issued prior to the January 1, 1995 effective date of the URAA. *See id.* at __, 94 F. Supp. 2d at 1357-59. The Court noted that Congress expressly prescribed in the URAA that § 1675(a)(4) "must be applied prospectively on or after January 1, 1995 for 19 U.S.C. § 1675 reviews." *Id.* at 1359 (citing URAA's § 291).

Because Commerce's duty absorption inquiry, its methodology and the parties' arguments at issue in this case are practically identical to those presented in *SKF USA*, the Court adheres to its reasoning in *SKF USA*. Moreover, contrary to Torrington's assertion, the Court finds that Commerce does not have the "inherent" authority to conduct a duty absorption inquiry in any administrative review. Rather, the statutory scheme, as noted, clearly provides that the inquiry must occur in the second or fourth administrative review after the publication of the antidumping duty order, not in any other review, and upon the request of a domestic interested party. Accordingly, the Court finds that Commerce did not have statutory or inherent authority to undertake a duty absorption investigation for the outstanding 1989 antidumping duty orders in dispute here.

II. *Profit Calculation for Constructed Value*

A. *Background*

For this POR, Commerce used constructed value ("CV") as the basis for normal value ("NV") "when there were no usable sales of the foreign like product in the comparison market." *Preliminary Results*, 64 Fed. Reg. at 8795. Commerce calculated the profit component of CV using the statutorily preferred methodology of 19 U.S.C. § 1677b(e)(2)(A) (1994). *See Final Results*, 64 Fed. Reg. at 35,611. Specifically, in calculating CV, the statutorily preferred method is to calculate an amount for profit based on "the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review . . . in connection with the production and sale of a foreign like product [made] in the ordinary course of trade, for consumption in the foreign country." 19 U.S.C. § 1677b(e)(2)(A).

In applying the preferred methodology for calculating CV profit, Commerce determined that "an aggregate calculation that encompasses all foreign like products under consideration for normal value represents a reasonable interpretation of [§ 1677b(e)(2)(A)]" and "the use of [such] aggregate data results in a reasonable and practical measure of profit that [Commerce] can apply consistently where there are sales of the foreign like product in the ordinary course of trade." *Id.* Also, in calculating CV profit under § 1677b(e)(2)(A), Commerce excluded below-cost sales from the calculation which it disregarded in the determination of NV pursuant to 19 U.S.C. § 1677b(b)(1) (1994). *See id.* at 35,612.

B. *Contentions of the Parties*

SKF contends that Commerce's use of aggregate data encompassing all foreign like products under consideration for NV in calculating CV profit is contrary to § 1677b(e)(2)(A). See SKF's Br. at 36-59. Instead, SKF claims that Commerce should have relied on the alternative methodology of § 1677b(e)(2)(B)(i), which provides a CV profit calculation that is similar to the one Commerce used, but does not limit the calculation to sales made in the ordinary course of trade, that is, below-cost sales are not excluded from the calculation. *See id.* at 36, 58-59. SKF also asserts that if Commerce's exclusion of below-cost sales from the numerator of the CV profit calculation is lawful, Commerce should nonetheless include such sales in the denominator of the calculation to temper bias which is inherent in the Commerce's dumping margin calculations. *See id.* at 4, 54-57.

Commerce responds that it properly calculated CV profit pursuant to § 1677b(e)(2)(A) based on aggregate profit data of all foreign like products under consideration for NV. *See* Def.'s Br. at 2-3, 27-47. Consequently, Commerce maintains that since it properly calculated CV profit under subparagraph (A) rather than (B) of § 1677b(e)(2), it correctly excluded below-cost sales from the CV profit calculation. *See id.* at 3, 38-40. Torrington agrees with Commerce's methodology for calculating CV profit. *See* Torrington's Resp. at 4-5, 41-47.

C. *Analysis*

In *RHP Bearings Ltd. v. United States*, 23 CIT __, 83 F. Supp. 2d 1322 (1999), this Court upheld Commerce's CV profit methodology of using aggregate data of all foreign like products under consideration for NV as being consistent with the antidumping statute. *See id.* at ___, 83 F. Supp. 2d at 1336. Since Commerce's CV profit methodology and SKF's arguments at issue in this case are practically identical to those presented in *RHP Bearings*, the Court adheres to its reasoning in *RHP Bearings*. The Court, therefore, finds that Commerce's CV profit methodology is in accordance with law.

Moreover, since (1) § 1677b(e)(2)(A) requires Commerce to use the actual amount for profit in connection with the production and sale of a foreign like product in the ordinary course of trade, and (2) 19 U.S.C. § 1677(15) (1994) provides that below-cost sales disregarded under § 1677b(b)(1) are considered to be outside the ordinary course of trade, the Court finds that Commerce properly excluded below-cost sales from the CV profit calculation.

CONCLUSION

For the foregoing reasons, the case is remanded to Commerce to annul all findings and conclusions made pursuant to the duty absorption inquiries conducted for the subject reviews. Commerce's final determination is affirmed in all other respects.

NICHOLAS TSOUCALAS
Senior Judge

Dated: August 23, 2000
New York, New York

(Slip Op. 00-107)

TA CHEN STAINLESS STEEL PIPE, INC., PLAINTIFF, *v.*
UNITED STATES, DEFENDANT

Court No. 97-08-01344

(Dated: August 25, 2000)

[Commerce remand determination affirmed.]

Ablondi, Foster, Sobin & Davidow, p.c. (*Joel Davidow* and *Peter Koeniq*) for plaintiff.
David W. Oqden, Assistant Attorney General, *David M. Cohen*, Director, *Velta A. Melnbrencis*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Mark L. Josephs*), *Cindy G. Buys*, Office of the General Counsel, United States Department of Commerce, of counsel, for defendant.

OPINION

RESTANI, *Judge*: On October 28, 1999, the court remanded the final results of the Department of Commerce, International Trade Administration ("Commerce" or "the Department") in *Certain Welded Stainless Steel Pipe from Taiwan*, 62 Fed. Reg. 37,543 (Dep't Commerce 1997) (final results of admin. rev.) [hereinafter "*Final Results*"]. *See Ta Chen Stainless Steel Pipe, Ltd. v. United States*, No. 97-08-01344, 1999 WL 1001194 (Ct. Int'l Trade Oct. 28, 1999). Familiarity with the court's earlier opinion is presumed.

Commerce issued its remand determination on February 25, 2000. *See Final Results of Redetermination Pursuant to Court Remand: Ta Chen Stainless Steel Pipe, Ltd., v. United States, Court No. 97-08-01344* [hereinafter "*Remand Results*" or "*RR*"]. Ta Chen contests the Department's applications of adverse facts available and selection of the adverse margin in the *Remand Results*.[1]

STANDARD OF REVIEW

In reviewing final determinations in antidumping duty investigations, the court shall hold unlawful any agency determination found unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i)(1994).

BACKGROUND

A. *Ta Chen's Affiliation with Sun Stainless, Inc.*

In the *Final Results*, Commerce found that Ta Chen was affiliated with one of its U.S. distributors, Sun Stainless, Inc. ("Sun"), by virtue of Ta Chen's control over Sun, pursuant to 19 U.S.C. § 1677(33)(G)(1994). *Final Results*, 62 Fed. Reg. at 37,549-50. Because of Ta Chen's affiliation with this U.S. distributor, Commerce determined that Ta Chen had constructed export price ("CEP") sales during the period of review ("POR"). Because Ta Chen had not provided data on Sun's U.S. sales, the record did not contain the information necessary to calculate CEP. Commerce determined that Ta Chen failed to comply to the best of its ability in providing Sun's U.S. sales information. *Id.* at 37,552-53. Therefore, Commerce applied partial adverse facts available for Sun's U.S. sales. *Id.*

The court held that Commerce's determination that Ta Chen controlled Sun was supported by substantial evidence. *Ta Chen*, 1999 WL 1001194 at *ll. The court found, however, that Commerce had failed to provide Ta Chen with sufficient notice of its determination that Ta Chen controlled Sun, and that the Department had never specifically requested the information on Sun's U.S. sales. *Id.* at *12. Therefore,

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[1] Avesta Sheffield Inc., Damascus Tube Division, Damascus-Bishop Tube Co., and United Steelborkers of America (AFL-CIO/CLC), defendant-intervenors as tom Ta Chen's Rule 56.2 motion, filed a stipulation of dismissal pxsuant to USCIT Rule 41(a)(l)(B) and no longer appear as defendant-intervenors in this case. See Ta Chen Stainless Steel Pine, Ltd. v. United States, No. 97-08-01344 (Ct. Int'l Trade Mar. 3, 2000) (stipulation of dismissal).

the court held that Commerce had failed to comply with its statutory obligation under 19 U.S.C. § 1677m(d) (1994) by failing to provide the respondent with notice of a deficient submission before applying facts available. *Id.* The court remanded the *Final Results* for Commerce to request Sun's U.S. sales information from Ta Chen. *Id.* at *14.

On November 9, 1999, Commerce issued a supplemental questionnaire to Ta Chen requesting information on Sun's U.S. sales in order to calculate CEP. *RR* at 2. Ta Chen contacted Picol Enterprises, Inc. ("Picol") for this information. Letters (Nov. 30, 1999), at 5, P.R. Dot. 1216, Def.'s Remand App., Tab 4, at 5. Sun's owner, Frank McLane, had sold Sun to Picol International and Masaru Kimura in July 1995. *Ta Chen's Response to Petitioner's Comments* (Dec. 20, 1996), at 12-14 & Ex. 3, C.R. Dot. 14, Pl.'s Prop. App. to 56.2 motion, Tab B, at 12-14 & Ex. 3. In response to its inquiry, Ta Chen received a letter dated November 25, 1999, from Picol Sun's counsel stating that it would not cooperate with the Department's inquiry because the company had closed on September 30, 1996. *Letters*, at 6, Def.'s Remand APP., Tab 4, at 6. Picol Sun's counsel stated that it no longer maintained any business operations in the United States and that it would be burdensome for Picol Sun to respond to the request. *Id.* Picol Sun's counsel did state that he would ask his client to reconsider. *Id.* On November 30, 1999, Ta Chen requested an extension of time in which to provide the Sun information, which the Department granted. *RR* at 2. On December 7, 1999, Ta Chen requested another extension, but the next day it forwarded the Department a letter from Picol Sun's counsel stating that it would not respond to the Department's questionnaire for the reasons stated in the November 25, 1999 letter. *Letters* (Dec. 8, 1999), at 2, P.R. Dot. 1218, Def.'s Remand App., Tab 7, at 2. Without the information on Sun's U.S. sales, Commerce did not have the information needed to calculate CEP.

Commerce concluded that because Ta Chen had withheld or failed to provide the information requested, it would apply facts otherwise available pursuant to 19 U.S.C. § 1677e(a) (1994). *RR* at 3. Commerce further concluded that Ta Chen had failed to comply to the best its ability in providing the information, and that an adverse inference pursuant to 19 U.S.C. § 1677e(b) was warranted for the Sun sales. *Id.* at 3-4. In calculating a partial adverse facts available margin, Commerce "assigned the highest calculated margin calculated for these final remand results to be applied to Ta Chen's sales to Sun." *Id.* at 5-6. The sale with the highest dumping margin was 30.95 percent, which Commerce used to recalculate the margin of 2.60 percent for Ta Chen's sales during the POR. *Id.* at 14-15. Ta Chen challenges the remand determination, contesting the application of adverse facts available and the selection of the margin.

B. *Alleged Commissions to Anderson*

In its motion for judgment on the agency record, Ta Chen challenged the Department's finding that Ta Chen had failed to report commis-

sions to a U.S. customer, Anderson Alloys. In the *Final Results*, Commerce had applied partial adverse facts available to Ta Chen's sales to Anderson. *Final Results*, 62 Fed. Reg. at 37,544. The court found that Commerce's finding in this regard was not supported by substantial evidence. *Ta Chen*, 1999 WL 1001194 at *16. The court directed Commerce either to provide Ta Chen with an opportunity to submit evidence on the purported commissions or to disregard this issue on remand. *Id.* at *17. On remand, Ta Chen responded to Commerce's supplemental questionnaire, stating that it had not made any sales during the POR on which it paid commissions to Anderson. *Remand Results* at 5. Commerce therefore did not apply facts available to Ta Chen's sales to Anderson upon remand. *Id.* This issue is thus no longer before the court.

DISCUSSION

I. *Application of adverse facts available*

Ta Chen contests the application of adverse facts available to its sales to Sun, arguing that it was unable to provide Sun's information because of the sale to Picol International and Masaru Kimura in July 1995. Ta Chen argues that the Department's remand determination impermissibly concludes that Ta Chen is affiliated with the new entity, Picol Sun. Ta Chen maintains that it did not have control over Picol Sun's records and could not force Picol Sun to provide the necessary information. Ta Chen states that Department precedent does not support the application of adverse facts when a respondent cannot obtain information from an affiliate, but only supports the application of neutral facts available.

Commerce concluded that it could expect Ta Chen to provide Sun's information. Commerce stated in the *Remand Results*:

> We are not convinced that Sun's closure is a sufficient explanation as to why Ta Chen cannot develop the necessary information. The requested data relates to a period when Ta Chen and Sun were readily sharing the subject information. Thus, this is not a situation where one corporate entity would object to disclosure of confidential business information to another corporate entity. In this situation, it is reasonable to expect Ta Chen to work with Sun's new owners to obtain the new information.

RR at 11. As Commerce notes, the burden of creating an accurate record rests with the respondent. *See Tianjin Mach. Import & Export Corp. v. United States*, 16 CIT 931, 936, 806 F. Supp. 1008, 1015 (1992) ("burden of creating an adequate record lies with respondents and not with Commerce") (citation omitted).

Ta Chen does not and cannot contest the fact it had operational control of Sun. The court found Commerce's affiliation finding supported by substantial evidence due to the numerous connections between Ta Chen and Sun. *See Ta Chen*, 1999 WL 1001194 at *4-10 (dis-

cussing Ta Chen and Sun's historical ties, Sun's distribution of only Ta Chen products, Ta Chen's custody of Sun's signature stamp, Ta Chen's credit monitoring of Sun, and debt financing arrangement between Ta Chen and Sun). It is reasonable for the Department to conclude that this operational control gave Ta Chen access to Sun's records. This conclusion is further supported by the fact that Ta Chen was able to provide other confidential records from Sun, such as Sun's federal income tax records. See *Final Results*, 62 Fed. Reg. at 37,552. It is also reasonable for Commerce to expect Ta Chen to maintain any relevant records pending the final outcome of the administrative review. *See Krupp Stahl A.G. v. United States*, 17 CIT 450, 454, 822 F. Supp. 789, 793 (1993) (stating that respondents are responsible for maintaining their records during a pending litigation); *Koyo Seiko Co. v. United States*, 16 CIT 366, 376, 796 F. Supp. 517, 525 (1992) (holding that respondent had responsibility of keeping records for the ongoing investigation despite Commerce's "extraordinary delay"). In order to comply to the best of its ability, Ta Chen should have preserved Sun's information in the event that its sales were classified as CEP.

Ta Chen argues that it did not have reason to provide Sun's information until January 1997, because the Department did not state its intention to classify Ta Chen's sales as CEP sales until the issuance of the Preliminary Results in January 1997. *See Certain Welded Stainless Steel Pipe from Taiwan*, 62 Fed. Reg. 1,435, 1,435-36 (Dep't Commerce 1997) (preliminary results of admin. rev.). By that time, Ta Chen argues, it could not have provided the information because Sun had already been sold. Ta Chen was nevertheless aware prior to January 1997 that its sales to Sun were at issue. As early as July 1994, Ta Chen knew its relationship with Sun was at issue because the petitioners had called it to the Department's attention in the first administrative review. *See Certain Welded Stainless Steel Pipe from Taiwan*, 64 Fed. Reg. 33,243, 33,244 (Dep't Commerce 1999) (final results of administrative review) (results from the first and second administrative reviews of Ta Chen). Petitioners also renewed their concerns regarding Sun in July 1995. *Id.* Ta Chen had reason to argue that it was not affiliated with Sun, pursuant to the new definition of the term "affiliated party." *Ta Chen*, 1999 WL 1001194 at *14. But Ta Chen cannot claim that it was unaware of the possibility that its sales would be classified as CEP sales, in light of its numerous connections with Sun. Ta Chen therefore could have, and should have, preserved its information on Sun's sales in order to provide full information for the Department.

Ta Chen also claims that the application of adverse facts available is inconsistent with prior determinations. Ta Chen cites in particular *Certain Cut-to-Length Carbon Steel Plate from Belgium*, 63 Fed. Reg. 2,959 (Dep't Commerce 1998) (final results of antidumping duty admin. rev.) [hereinafter "Cut-to-Length from Belgium"]. In that determination, Commerce stated it "may resort to adverse facts available in response to [respondent's] failure to report [information from an af-

filiate] unless [respondent] establishes that it could not compel its affiliate to report [the information]." *Id.* Commerce chose not to make an adverse inference in that determination because the Department had not informed the respondent of certain deficiencies in the respondent's attempt to show that it could not obtain the information from the affiliate. *Id.* Similarly, in the other determinations cited by Ta Chen, Commerce applied a general rule of not using adverse facts when the respondent could demonstrate that it did try to obtain information from an affiliate. *See Roller Chain, Other than Bicycle, from Japan*, 62 Fed. Reg. 60,472, 60,476 (Dep't Commerce 1997) (notice of final results and partial recission of antidumping duty administrative review) (despite respondent's efforts, "it was not in a position to compel the affiliated customer to produce the information requested by the Department" and Department did not apply adverse facts available); see also Certain Fresh Cut Flowers from Colombia, 63 Fed. Reg. 5,354, 5,356 (Dep't Commerce 1998) (preliminary results and partial termination of antidumping duty admin. rev.) (Department chose not to apply adverse facts for missing information where respondent's "exhaustive efforts at locating [the information from a former affiliate] . . . were futile"); *Certain Cut-to-Length Carbon Steel Plate from Brazil*, 63 Fed. Reg. 12,744, 12,751 (Dep't Commerce 1998) (final results of antidumping duty admin. rev.) (Department did not apply adverse inference where respondent "did attempt to obtain [COP] information from its affiliate" and where nature of affiliation was such that respondent could not compel affiliate to provide information).

On remand, Commerce applied this general rule as stated in *Cut-to-Length from Belgium*. As in that determination, the burden was on Ta Chen to show that it could not compel Sun to provide the information. Ta Chen failed to meet that burden. Upon remand, Ta Chen simply forwarded the Department's questionnaire to Picol Sun, and once Picol Sun's counsel stated that Sun did not wish to comply, Ta Chen informed the Department that it would be unable to provide Sun's information. This was not a sufficient effort on the part of Ta Chen. *See Kawasaki Steel Corp. v. United States*, No. 99-08-00482, Slip Op. 00-91 at 22-23 (Ct. Int'l Trade, Aug. 1, 2000) (holding that respondent's letters requesting information from affiliate were insufficient to show respondent cooperated to best of its ability because respondent simply acquiesced in affiliate's refusal to provide information).

Ta Chen argues that it was not provided with notice that its attempts to compel Picol Sun to provide the information were deficient. First, on remand time is of the essence, and parties need to take all steps necessary to comply with Commerce's requests promptly and forcefully. Second, the court cannot conclude that one additional chance for Ta Chen to remedy its errors would have made a difference in this case, because the Department's decision to apply adverse facts available is also supported by the fact that Ta Chen could have done more to preserve the information on Sun's U.S. sales when it clearly had control of the information. By not doing so, Ta Chen failed to comply

to the best of its ability. The court therefore affirms the application of adverse facts available pursuant to 19 U.S.C. § 1677e(b).

II. *Selection of the adverse margin*

In the *Final Results*, Commerce applied a 31.90 percent margin as partial adverse facts to Ta Chen's sales to Sun and Anderson. *Final Results*, 62 Fed. Reg. at 37,555-56. This margin was the highest rate from the less than fair value investigation. *Ta Chen*, 1999 WL 1001194 at *17. This resulted in a weighted-average margin of 6.06 percent. *Final Results*, 62 Fed. Reg. at 37,556. The court did not address Ta Chen's arguments concerning corroboration of the margin from data outside the review in its 56.2 motion, in light of its remand instructions. *Ta Chen*, 1999 WL 1001194 at *18.

On remand, Commerce applied an adverse inference only as to Ta Chen's sales to Sun. In recalculating the margin, Commerce "assigned the highest calculated margin for these remand results to be applied to Ta Chen's sales to Sun." *RR* at 5-6.[2] The margin used was 30.95 percent, which led to a recalculated weighted-average margin of 2.60 percent. *Id.* at 15-18. In choosing this margin, the Department explained:

> In conducting its own analysis of Ta Chen's U.S. sales, the Department found that the price and quantity of the sales for which a 30.95% dumping margin was calculated all fell within the normal range of price and quantity as the other sales; these sales were not unusually high or low in price or quantity. Furthermore, the product for which a 30.95% dumping margin was calculated was a normal product of Ta Chen's . . . . Additionally, the Department chose the 30.95% rate because it was calculated from Ta Chen's own sales.

RR at 16-17.

Ta Chen first argues that an adverse margin is unwarranted. Based on this assumption, Ta Chen maintains that the Department should have followed its practice of using the weighted-average dumping margin calculated for all of a respondent's other sales as the dumping margin for those sales lacking .the information necessary to calculate a dumping margin. *See Static Random Access Memory Semiconductors from Taiwan*, 63 Fed. Reg. 8,909, 8,920 (Dep't Commerce 1998) (notice of final determination of sales at LTFV) ("as facts available [Department] used the weighted-average dumping margin calculated for all of [respondent's] other sales"). Ta Chen acknowledges that doing so would have resulted in a weighted-average dumping margin of close to zero percent. This argument fails because the use of an adverse inference is warranted based on these facts, as already discussed. Commerce, therefore, was not required to use its neutral facts available methodology.

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[2] Corroboration pursuant to 19 U.S.C. I 1677e(c) is not challenged because Commerce selected a margin based on Ta Chen's own information from this review.

Ta Chen further argues that the *Remand Results* are contrary to court precedent and Commerce's own practice. Ta Chen asserts that the margin used by Commerce is aberrant, and that such margins may not be used. Under the former best information available ("BIA") rule, the court required Commerce to show that the margin it selected as BIA was not aberrant. *See National Steel Corp. v. United States*, 18 CIT 1126, 1132-33, 870 F. Supp. 1130, 1136 (1994) ["*NSC I*"]. Ta Chen, however, misunderstands the court's concerns regarding aberrant margins. The court in NSC I did not hold that because a significant portion of respondent's sales had margins below the selected rate, that the selected rate was aberrant. Rather, the court's concern was that Commerce show that the particular margin chosen bear a "rational relationship" to respondent's sales. *Id.* (citation omitted). The *NSC I* court thus remanded the case for Commerce to explain why its selection of the BIA rate was not aberrant. *Id.* at 1133, 870 F. Supp. at 1137. After remand, the court accepted Commerce's criteria for selecting the highest non-aberrant margin as BIA. *National Steel Corp. v. United States*, 20 CIT 100, 103, 913 F. Supp. 593, 596 (1996) ["*NSC II*"]. Commerce's guidelines for selecting the highest non-aberrant margin were to choose a margin "sufficiently adverse and . . . indicative of current conditions." *Id.*

After a second remand, the court upheld the specific margin used by Commerce because the margin came from sales which involved a common product and fell within the mainstream of respondent's transactions. *National Steel Corp. v. United States*, 20 CIT 743, 745-46, 929 F. Supp. 1577, 1580 (1996) ["*NCS III*"]. In upholding the BIA margin, the court also noted that "[there was] nothing in the record to indicate that [the] particular sale was not transacted in a normal manner." *Id.*; *see also Calcium Aluminate Cement, Cement Clinker and Flux from France*, 59 Fed. Reg. 14,136, 14,141 (Dep't Commerce 1994) (final determinations of sales at LTFV) ("When we resort to partial BIA, it is our practice to use the highest non-aberrational margin based on respondent's reported sales. This is an adverse figure, yet is based on the respondent's calculated margins.")[3] Commerce's selection of the 30.95 percent margin as the adverse rate in this case conforms to the court's requirement that the rate not be aberrant, because although the rate is adverse, it is indicative of Ta Chen's sales.

The Department continues to use the highest non-aberrational margin as adverse facts available. *See Stainless Steel Sheet and Strip in Coils from Germany*, 64 Fed. Reg. 30,710, 30,714 (Dep't Commerce 1999) (final determination of sales at LTFV) ("As adverse facts available we have assigned the highest non-aberrational margin calcu-

[3] Commerce certainly may not use a margin known to be inaccurate. *See D&L Supply Co. v. United States*, 113 F.3d 1220, 1224 (Fed. Cir. 1997) (holding that Commerce may not use highest margin from prior administrative review as BIA where that margin has been "demonstrated to be inaccurate"). The margin used here, however, is not inaccurate. It was calculated based on Ta Chen's own reported data. The court in *D&L Supply* noted that the purpose of using the highest prior antidumping duty rate as BIA is to "[offer] some assurance that the exporter will not benefit from refusing to provide information, and [to produce] a . . . rate that bears some relationship to past practices in the industry in question." *Id.* at 1223. While the margin used here was not drawn from a prior review, the same goals are served by using the 30.95 percent margin: Ta Chen will not benefit from refusing to provide the information, and the margin bears a rational relationship to Ta Chen's selling practices.

lated for this final determination . . .") In that determination, Commerce determined the highest non-aberrational margin by examining the frequency distribution of the margins calculated for the respondent's reported data. Commerce then selected the highest margin for the 10 percent of respondent's transactions which fell within a specific range. *Id.* Ta Chen argues that the Department did not use this same methodology in the remand results. The Government acknowledges that Commerce did not use the precise methodology as stated in *Stainless Steel Sheet and Strip in Coils from Germany*, because to have done so would have resulted in a final margin of zero percent, thereby eviscerating the adverse inference.

Ta Chen argues that Commerce cannot choose a facts available margin based solely on the fact that it is the highest margin available. Ta Chen relies on *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185 (Fed. Cir. 1990). *Rhone Poulenc*, however, supports Commerce's position. Analyzing Commerce's practice under BIA, the Federal Circuit stated that it was appropriate for Commerce to presume that the highest prior margin was the best information of current margins. This presumption "reflect[ed] a common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less." *Id.* at 1190. This reasoning also applies in this case because using the highest calculated dumping margin provided an incentive for Ta Chen and other respondents to produce information.

Ta Chen also contests the Department's characterization of the sales with the 30.95 percent dumping margin as falling within the normal range of price compared to other sales. Ta Chen states that the 0.04 percent of sales with a 30.95 percent dumping margin were at a significantly lower price than other Ta Chen sales. Ta Chen Remand Br. at 28. Commerce's determination that the price of the sales for which a 30.95 percent dumping margin was calculated fell within the normal range of price as other sales, is supported. In comparing price, Commerce printed lists of the twenty-one highest negative and positive margins for Ta Chen. The price of the sales with the 30.95 percent dumping margin fell within the range of these prices.[4] As in *NSC III*, 20 CIT at 746, 929 F. Supp. at 1580, there is nothing to indicate that the sales with this particular margin were not "transacted in a normal manner."[5]

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[4] The prices for the positive dumping margins ranged from [ ] to [ ]. *Final Margin Calculations* (Jan. 18, 2000), at 54, C.R. Dot. 1269, Def.'s Remand Ex. 2, at 1. The price of the 30.95 percent sale was [ ]. *Id.* The prices for the negative dumping margins ranged from [ ] to [ ]. *Id.* at 56, Def.'s Remand Ex. 2 , at 2 .

[5] Ta Chen also contests Commerce's characterization the 30.95 percent sales as falling within the range of Ta Chen's other sales for quantity. The Government explains Commerce's position by noting that the quantity of the sales with the 30.95 percent margin was [ ], and the range for the other sales was from [ ] to [ ]. Govt' Remand Br. at 29 (referring to Ta Chen's data sets attached to *Ta Chen's Supplemental Questionnaire Response* (Nov. 12, 19961, C.R. Dot. 8). Given the range, this is not a particularly telling factor; but Commerce's other bases for testing the margin are supportive of its choice. Further, the highest margin selected was close to margins for other sales, although the percentage of sales with positive margins was small. Ta Chen also argues that the number of sales of the product was not typical because it only represented 2.4 percent of Ta Chen's POR sales. The Government states that Ta Chen made [ ] sales of this product during the POR. *Id.* The Government notes that the number of sales is substantial, "regardless of the percentage these sales represent of Ta Chen's total sales." Gov't Remand Br. at 29.

Ta Chen maintains that Commerce may not use a margin where fewer than 0.5 percent of the respondent's sales had that margin, because such sales are *de minimis*. The Government argues that "the number of sales with the chosen dumping margin [is not] a factor in determining whether the margin is useable as facts available. Instead, Commerce seeks to determine whether the sale on which the margin is derived is otherwise representative of a respondent's other sales." Gov't Remand Br. at 31-32. Ta Chen relies on two revocation decisions for its position. *See Pure Magnesium from Canada*, 64 Fed. Reg. 50,489 (Dep't Commerce 1999) (final results of antidumping duty admin. rev. and determination not to revoke order in part); *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada*, 64 Fed. Reg. 2,173 (Dep't Commerce 1999) (final results of antidumping duty admin. revs. and determination to revoke in part). Commerce distinguished these determinations in the *Remand Results* on the basis that they involved the issue of whether dumping margins were reflective of a company's normal practice in the context of determining whether the sales had been made in commercial quantities for purposes of a revocation decision. *RR* at 17. Those determinations did not involve the use of adverse facts available. Commerce stated that it had never determined that an adverse facts available margin should be reflective of a respondent's actual dumping margins. The purpose of applying adverse facts available is to induce respondents to cooperate with the Department's proceedings." *Id.* While the court does not accept Commerce's proposition that accuracy is not a goal when using adverse facts available,[6] it agrees with Commerce that in these particular circumstances, if Commerce rejected Ta Chen's sales which had positive dumping margins on the ground that they were *de minimis*, Commerce would not be applying an adverse inference, while still using Ta Chen's information, because Ta Chen would receive a zero percent dumping margin.

Ta Chen lastly argues that Commerce's choice of the partial adverse facts margin is inconsistent with the record as a whole. Ta Chen maintains that it is unreasonable to conclude that the partial 30.95 percent margin is indicative of Ta Chen's actual selling practices. Ta Chen ignores that the methodology chosen by Commerce was the only way to apply an adverse inference in this case, while still using respondent's own information. Ta Chen's argument that a lower margin, of zero or 3.27 percent,[7] would also serve the purpose of inducing Ta Chen to cooperate is not persuasive. One of the pur-

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[6] The court has previously noted its concern that facts available margins bear a rational relationship to the matter to which they are applied. *See Ferro Union, Inc. v. United States*, 44 F. Supp.2d 1310, 1334-35 (Ct. Int'l Trade 1999) (Commerce must select a total substitute margin which is relevant and reliable, and bears rational relationship to matter to which it is applied); *World Finer Foods, Inc. v. United States*, No. 99-03-00138, 2000 WL 897752 at *6 (Ct. Int'l Trade June 26, 2000) (court will not uphold use of individual transaction margins which bear no apparent relationship to current level of dumping in industry to corroborate a total substitute margin).

[7] Ta Chen received a 3.27 percent dumping margin in the original less than fair value investigation. *Certain Welded Stainless Steel Pipe from Taiwan*, 57 Fed. Reg. 62,300, 62,301 (Dep't Commerce 1992) (amended final determination and antidumping duty order).

poses of using adverse facts available is to "ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." Statement of Administrative Action ("SAA"), accompanying H.R. Rep. No. 103-826(I), at 870, *reprinted in* 1994 U.S.C.C.A.N. 3773, 4199; *see also NSC I*, 18 CIT at 1132, 870 F. Supp. at 1136 (recognizing under BIA that "although the ultimate purpose of BIA is not to punish, BIA is intended to be adverse"). If Commerce had used one of the lower margins, as suggested by Ta Chen, Ta Chen might have achieved a better result by failing to cooperate than by cooperating and providing Sun's information. The SAA also states that Commerce does not have to prove that the facts available are the best alternative information. "Rather, the facts available are information or inferences which are reasonable to use under the circumstances." SAA at 869, 1994 U.S.C.C.A.N. at 4198. The court therefore affirms the use of the 30.95 percent margin as partial adverse facts available, resulting in an overall 2.60 percent margin for Ta Chen after remand.

CONCLUSION

Commerce's application of partial adverse facts available and its selection of the adverse margin were in accordance with law and supported by substantial evidence. The remand results are therefore affirmed in their entirety.

JANE A. RESTANI
Judge

Dated: New York, New York
This 25th day of August, 2000.

(Slip Op. 00-108)

AMMEX, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Court No.: 99-01-00013

(Decided August 25, 2000)

Before: WALLACH, *Judge*

Steptoe & Johnson LLP (*Herbert C. Shelley*, *Alice A. Kipel*, *Gregory S. McCue* and *David N. Tanenbaum*), for Plaintiff.

David W. Ogden, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Amy M. Rubin*); *Beth C. Brotman*, Office of Assistant Chief Counsel, United States Customs Service, of counsel, for Defendant.

OPINION

I

INTRODUCTION

This case is before the court upon the Motion Of Plaintiff Ammex, Inc. For Judgment Upon The Agency Record. Plaintiff challenges the decision of the U.S. Customs Service ("Customs") not to allow it to sell duty-free gasoline and diesel fuel from its duty-free store in Detroit, Michigan. For the reasons stated below, the court finds Custom's decision not to be in accordance with law.

II

BACKGROUND

At issue in this case is Plaintiff's challenge of Customs Headquarters Ruling 227385 of February 12, 1998 ("HQ 227385"). In HQ 227385, Customs reaffirmed a 1994 headquarters ruling which found that the activities of duty-free stores should not be extended to cover "unidentifiable fungible" goods, such as gasoline and diesel fuel, when sold on a retail basis. In the 1994 ruling, Customs found, *inter alia*, that because such merchandise could not be subject to marking or other identification under 19 U.S.C. § 1555(b)(3)(D),[1] Customs would have no practical way of ensuring that the duty-free gasoline was "declared" when vehicles returned to the United States. *See* Customs Headquarters Ruling 225287 of June 27, 1994 ("HQ 225287"), at 4-5.

In HQ 227385, Customs revisited the issue of duty-free gasoline and diesel sales in light of Plaintiff's request that Customs reconsider its 1994 ruling. Analyzing the legislative history of the Omnibus Trade and Competitiveness Act of 1988, which established legislative guidelines for Customs' administration of duty-free shops, Customs concluded that "the fact that Congress did not specifically reject Customs policy regarding the sale of gasoline by duty-free stores means that Congress did not object to such practice." HQ 227385 at 5. Thus, it reasoned, "in holding that gasoline and diesel fuel may not be sold by duty-free stores, it was proper to follow the precedent established by ruling letter 200396." *Id.* In Ruling Letter 200396, the Assistant Commissioner of Customs' Office of Regulations and Rulings, Leonard Lehman, held that the activities of duty-free stores could not be extended to unidentifiable fungibles, such as gasoline sold on a retail basis, since Customs would have no practical way of ensuring that the gasoline was declared when it was returned to the United States. Customs Ruling Letter 200396 of October 30, 1972.[2]

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[1] In relevant part, 19 U.S.C. § 1555(b) (1994), which governs "[d]uty-free sales enterprises," provides as follows:

> (3) Each duty-free sales enterprise . . . (D) shall not be required to mark or otherwise place a distinguishing identifier on individual items of merchandise to indicate that the items were sold by a duty-free sales enterprise, unless the Secretary finds a pattern in which such items are being brought back into the customs territory without declaration.

[2] Ruling Letter 200396 was also cited approvingly and quoted in HR 225287. *See* HQ 225287 at 3 and 5.

In its 1998 ruling, Customs also rejected Plaintiff's argument that, in allowing U.S. residents to apply merchandise purchased from a U.S. duty-free store against their $400 personal duty exemption allowance, the Miscellaneous Trade and Technical Corrections Act of 1996 rendered Ruling Letter 200396 and HQ 225287 obsolete. Besides pointing to the lack of any explicit Congressional intent to overturn these determinations, Customs observed that

> the eligibility for a duty exemption does not exempt the imported merchandise from being subject to other customs laws. The exemption from duty depends on the status of the individual and the circumstances regarding the exportation of the goods, the time spent out of the United States, and the frequency of the claims for eligibility. In order to administer those requirements, the need for simple effective controls has not been lessened by the 1996 statutory change.

HQ 227385 at 7.

By letter dated May 12, 1998, Ammex, Inc. ("Ammex") attempted to protest HQ 227385 under 19 U.S.C. § 1514(a) (1994). On July 9, 1998, Customs ruled that HQ 227385 was not protestable under this provision, since HQ 227385 did not require Ammex to make any payment or cause an assessment on any kind. *See* Customs Headquarters Ruling 228021 of July 9, 1998. Thereafter, Plaintiff filed its Complaint in this matter on January 12, 1999, timely putting its challenge to HQ 227385 before this court. After considering various motions by Plaintiff to either supplement the administrative record in this case and/or conduct limited discovery,[3] the court heard oral argument on August 16, 2000.

The court has jurisdiction under 28 U.S.C. § 1581(i) (1994). *See Duty Free Int'l, Inc. v. United States*, 17 CIT 1425, 1425 (1993), *aff'd* 88 F.3d 1046 (Fed. Cir. 1996).[4]

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[3] *See Ammex, Inc. v. United States*, 62 F. Supp.2d 1148 (CIT 1999) (granting in part and denying in part Plaintiff's motion for discovery); the court's Order dated December 6, 1999 (granting Plaintiff's unopposed motion for additional discovery); and *Ammex, Inc. v. United States*, 86 F. Supp.2d 1278 (CIT 1999) (denying Plaintiff's motion to supplement the administrative record and seek additional discovery).

[4] Both parties agree that jurisdiction rests under § 1581(i), which provides this court with jurisdiction over "any civil action . . . that arises out of any law . . . providing for- (1) revenue from imports or tonnage; (2) tariffs . . . on the importation of merchandise for reasons other than the raising of revenue;(3) embargoes or other quantitative restrictions . . . for reasons other than the protection of the public health or safety; or (4) administration and enforcement with respect to [such] matters . . . ." In its brief, however, Plaintiff also alleges jurisdiction under § 1581(h), which allows for certain pre-importation rulings where, *inter alia*, an importer "demonstrates . . . that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to . . . importation." Although Defendant argued, and Plaintiff conceded at oral argument, that § 1581(h) did not lie in this case, the court is constrained to independently determine whether any other basis for jurisdiction supersedes § 1581(i). *See NEC Corp. v. United States*, 151 F.3d 1361, 1368 (Fed. Cir. 1998) (finding jurisdiction under § 1581(i) "available only when jurisdiction under another subsection of 1581 is either unavailable or, if available, 'manifestly inadequate'").

> To show irreparable harm for purposes of § 1581(h), Plaintiff submitted the affidavit of Mr. Francois Levesque, President of Ammex, Inc., which states that Ammex has "sustained significant financial losses . . . through the loss of duty-free gasoline and diesel fuel sales." Mr. Levesque's affidavit, however, lacks any foundational basis for this conclusion, as there is no indication that he conducted a review of admissible evidence and was qualified to reach conclusions about it. See USCIT R. 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."). As Plaintiff has not provided any other relevant evidence, it has not demonstrated irreparable

III

THE COURT SHALL HOLD UNLAWFUL AGENCY ACTION THAT IS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR NOT IN ACCORDANCE WITH LAW

28 U.S.C. § 2640(e) (1994) provides that "[i]n any civil action not specified in this section, the [court] shall review the matter as provided in [5 U.S.C. § 706]." In turn, 5 U.S.C. § 706(2)(A) (1994) provides, in relevant part, that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions of law found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The scope of the court's review is limited to the "*whole record* or those parts of it cited by a party." 5 U.S.C. § 706 (1994) (emphasis added); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (stating that a review of the "whole record" under § 706 "is to be based on the full administrative record that was before the Secretary at the time he made his decision").

IV

CUSTOM'S DECISION TO PROHIBIT AMMEX FROM SELLING DUTY-FREE GASOLINE AND DIESEL FUEL IS NOT IN ACCORDANCE WITH LAW

Plaintiff first argues that Customs' decision to prohibit Ammex from selling duty-free gasoline and diesel fuel violates 19 U.S.C. § 1557(a)(1) (1994), which allows "[a]ny merchandise subject to duty, with the exception of perishable articles and explosive substances" to be entered and withdrawn (for exportation) from bonded warehouses, such as duty-free stores. According to Plaintiff, Customs' prohibition on the sale of "unidentifiable fungibles," such as gasoline and diesel fuel, creates an additional exception to the general authorization set forth in § 1557(a)(1) that enjoys no support in either the statute or its implementing regulations. *See* Brief In Support Of Ammex's Rule 56.1 Motion For Judgment Upon The Agency Record ("Plaintiff's Brief") at 9-13.

The first question to consider in reviewing an agency's construction of a statute it administers is "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. United States*, 467 U.S. 837, 842 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43; *see also Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) ("To ascertain whether Congress had an intention on the precise question at issue, we employ the traditional tools of statutory construction. The first and foremost tool to be used is the

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harm for purposes of § 1581(h). *Compare Holford USA Ltd. Inc. v. United States*, 19 CIT 1486, 1492, 912 F. Supp. 555, 560 (1995) (holding that affidavits, plus other supporting materials, adequately demonstrated irreparable harm). Accordingly, because the other provisions of § 1581 (§ 1581(a)-(c)) are inapposite to Plaintiff's claim, the court finds jurisdiction proper under § 1581(i).

statute's text, giving it its plain meaning.") (internal quotes and citation omitted).

In this case, 19 U.S.C.§ 1557(a)(1) (1994), as well as the other provisions covering duty-free stores and bonded warehouses, make clear the scope of merchandise that may be entered and withdrawn from duty-free enterprises. In relevant part, § 1557(a)(1) provides that

> *Any merchandise subject to duty, with the exception of perishable articles and explosive substances* other than firecrackers, *may be entered for warehousing and be deposited in a bonded warehouse* at the expense and risk of the owner [,] purchaser, importer, or consignee. Such merchandise may be withdrawn, at any time within 5 years from the date of importation, for consumption upon payment of the duties and charges accruing thereon at the rate of duty imposed by law upon such merchandise at the date of withdrawal; or *may be withdrawn for exportation or for transportation and exportation to a foreign country* . . . . (emphasis added).

On its face, the plain language of § 1557(a)(1) shows Congress' intent that there be only two restrictions on the type of dutiable merchandise that may be stored or withdrawn from a bonded warehouse: (1) perishable articles and (2) explosive substances other than firecrackers. Customs did not find that diesel fuel and gasoline fall within either of these exceptions.[5] Accordingly, since duty-free stores are a type of bonded warehouse,[6] the plain language of § 1557(a)(1) makes both items eligible for sale from duty-free stores.[7]

In its brief, the government asserts that § 1557(a)(1) is not dispositive of Plaintiff's claim, arguing the more specific provisions for duty-free stores set out in 19 U.S.C. § 1555(b)(3)(D) and (E) provide *additional limitations* on the type of merchandise that may be sold duty-

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[5] Nor does it appear that Customs could have made such a finding. See 18 U.S.C. §§ 841(c) ("'Explosive materials' means explosives, blasting agents, and detonators."), 841(d) ("'[E]xplosives' means any chemical compound mixture, or device, the primary or common purpose of which is to function by explosion; [including] dynamite and other high explosives, black powder, pellet powder, initiating explosives, detonators, safety fuses, squibs, detonating cord, igniter cord, and igniters.") and 841(e) (1994) ("'Blasting agent' means any material or mixture, consisting of fuel or oxidizer, intended for blasting . . . ."); "List of Explosive Materials," ATF Pub. P 5400.8 (listing explosives, blasting agents and detonators subject to regulation under 18 U.S.C. Chapter 40); see also 18 U.S.C. § 844(j) (1994) (defining "explosive" for various criminal provisions). Customs, in its regulations, distinguishes between "explosive substances" and other "[d]angerous and highly flammable merchandise." See 19 C.F.R. § 144.1 (2000) ("Dangerous and highly flammable merchandise, though not classified as explosive, shall not be entered for warehouse without the written consent of the insurance company insuring the warehouse . . . .").

[6] The relevant statutory provisions make clear that duty-free stores are a type, or subsection, of bonded warehouses. Not only is the specific provision for duty-free sales enterprises (19 U.S.C. § 1555(b) (1994)) a subsection of the general statute (§ 1555) for bonded warehouses, but 19 U.S.C. § 1555(b)(7) (1994) provides that "[t]he Secretary shall by regulation establish a separate class of bonded warehouses for duty-free sales enterprises." *See also* 19 C.F.R. § 19.35(a) (1997) (designating duty-free stores as "Class 9 warehouses" and providing that "[e]xcept insofar as the provisions of this section and §§19.36-19.39 are more specific, the procedures for bonded warehouses apply to duty-free stores (Class 9 warehouses)."); S. Rep. 100-71, at 230 (1988) ("Duty-free sales enterprises are a special category of 'bonded warehouses' and it is under the bonded warehouse provisions of section 555 (and related sections) of the Tariff Act that they have been regulated.").

[7] In response to the court's Order of July 27, 2000, that the parties be prepared to discuss the history of this statute, at oral argument both counsel presented sophisticated and useful analyses. As the court noted at the time, Plaintiff's counsel did a particularly extensive and thorough job in tracing the origin of this statute, and is commended for that effort.

free. See Defendant's Response To Plaintiff's Motion For Judgment Upon The Agency Record ("Defendant's Response") at 13-15; *see also* HQ 225287 at 4 ("Clearly, inclusion of this caveat [§1555(b)(3)] indicates an intent that the merchandise which could be sold in a duty-free store would be 'individual items of merchandise' which could be market or otherwise identified."). In relevant part, 19 U.S.C. §1555(b)(3)(1994) provides that "[e]ach duty-free sales enterprise":

> (D) shall not be required to mark or otherwise place a distinguishing identifier on individual items of merchandise to indicate that the items were sold by a duty-free sales enterprise, unless the Secretary finds a pattern in which such items are being brought back into the customs territory without declaration;
> (E) may unpack merchandise into saleable units after it has been entered from warehouse and placed in a duty-free sales enterprise, without requirement of further permits.?

According to Defendant, by providing that duty-free stores will not be required to mark "individual items of merchandise" unless a pattern of reimportation exists, and that merchandise may be unpacked into saleable units, "Congress was plainly indicating the existence of four factors with respect to the type of merchandise that may be sold in a duty-free store: (1) the goods sold in duty-free stores constitute 'individual items of merchandise,' (2) the goods actually sold in duty-free stores consist of pre-designated 'saleable units,' (3) the goods sold in duty-free stores must be capable of being marked, and (4) if a pattern of reimportation exists with respect to particular goods, the Secretary must have some means of detecting such a pattern." Defendant's Response at 15-16. Because gasoline and diesel fuel possess none of these features, Defendant asserts, Customs correctly prohibited their sale from duty-free stores. *See id.* at 15-16.

Essentially, the government reads § 1555(b)(3)(D) as authorizing Customs to require duty-free enterprises to sell only *individual items of merchandise* that are *capable of being individually marked*. On its face, § 1555(b)(3)(D) supports no such interpretation. Section 1555(b)(3)(D) simply gives Customs the power to identify merchandise that is being reimported without declaration; nothing in the language or history of this provision authorizes Customs to prohibit the sale of certain merchandise outright, or encumber the sale of merchandise before a pattern of illegal reimportation is discovered. In fact, Defendant's interpretation is directly contrary to Congress' intent, as evidenced in the relevant conference report, that Customs impose the least restrictions possible on the sale of duty-free merchandise.[8]

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[8] See House Conf. Rep. No. 100-576, at 769-70 (1988), reprinted in 1988 U.S.C.C.A.N. at 1802-03 ("This amendment creates a limited exception to the general prohibition on any requirement that duty-free stores mark their merchandise to indicate that it was sold in a duty-free store. It authorizes the Secretary, in particular circumstances, to require a duty-free store to apply an inconspicuous mark or distinguishing identifier on certain of its merchandise. Before imposing such a requirement, the Secretary must find that a pattern or practice exists involving the reimportation of duty-free merchandise without declaration, occurring over a significant period of time. It is not intended that episodic or occasional instances would constitute a pattern or practice.").

Defendant's characterization of 19 U.S.C. § 1555(b)(3)(E) (1994) is similarly strained. This provision provides simply that a duty-free enterprise "may unpack merchandise into saleable units." Defendant's interpretation, however, essentially substitutes the phrase "shall sell" for the language "may unpack," and imposes the limiting adjective "pre-designated" before "saleable units." *See* Defendant's Response at 15 (arguing that "Congress was plainly indicating . . . [that] . . . the goods *actually sold* in duty-free stores consist of *pre-designated* 'saleable units.'") (emphasis added). In doing so, Defendant significantly distorts the meaning of this statute, converting a general congressional authorization concerning the unpacking of merchandise into a specific congressional delineation of what merchandise may be sold duty-free. No reasonable interpretation of § 1555(b)(3)(E) supports such a fundamental change.

Accordingly, because there is no conflict between 19 U.S.C. § 1557(a)(1) (1994) and the specific provisions under 19 U.S.C. § 1555(b) (1994) for duty-free enterprises,[9] § 1557(a)(1) is dispositive of Plaintiff's claim. In view of § 1557(a)(1)'s instruction that "[a]ny merchandise subject to duty" may be entered and withdrawn from a bonded warehouse, the court finds that Customs violated this provision in promulgating HQ 227385. Section 1557(a)(1) provides that all types of dutiable merchandise may be sold from bonded warehouses, including duty-free stores, and it was error for the government to read into 19 U.S.C. § 1555(b)(3)(D) and (E) an exception beyond those specifically stated in § 1557(a)(1). *See A. H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 ("To extend an exemption to other than those plainly and unmistakably within [a statute's] terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.").[10] Had Congress intended Customs to restrict the sale of gasoline, diesel fuel, or other such fungible merchandise through duty-free stores, as the government claims, it could have included language to this effect in the statute. That Congress failed to identify such an intention in either the language or legislative history of § 1555(b), however, persuades this court that the statute contains no such restriction.[11] *See Ciba-Geigy Corp. v. United States*, 2000 WL 1141256 at *6 (Fed. Cir. 2000) ("When confronted with unambiguous statutory language, we will not discount the statute's plain language by assuming ignorance on the part of Congress. . . . If . . . the [statute] no longer

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[9] Nor is there any conflict between § 1557(a)(1) and any regulation promulgated by Customs. 19 C.F.R. § 19.36(e) (1997), governing "[m]erchandise eligible for warehousing," states simply that "[o]nly conditionally duty-free merchandise may be placed in a bonded storage area of a Class 9 warehouse." "Conditionally duty free merchandise," in turn, is defined as "merchandise sold by a duty-free store on which duties and/or internal revenue taxes (where applicable) have not been paid." 19 C.F.R. § 19.35(a) (1997).

[10] *See also* Sutherland Statutes And Statutory Construction (6th ed. 2000), § 47:11 ("[W]here a general provision in a statute has certain limited exceptions, all doubts should be resolved in favor of the general provision rather than the exceptions.")

[11] This is particularly true since, in promulgating specific provisions to govern duty-free enterprises, Congress sought to establish a comprehensive statutory framework that would provide for greater uniformity and consistency in the regulation of duty free sales enterprises. *See Duty Free Int'l*, 16 CIT at 164-65 (quoting and discussing § 1908(a) of The Omnibus Trade and Competitiveness Act of 1988, Pub.L. No. 100-418, and S.Rep. No. 100-71 (1987) at 229-30).

reflects the intent of Congress, it is Congress's task to change the words of the statute."); *Ishida v. United States*, 59 F.3d 1224, 1231 (Fed. Cir. 1995) (noting that, had Congress intended to limit the coverage of the Civil Liberties Act of 1988 in the manner asserted by the government, Congress could have expressed its intent in the statutory language).[12]

V
CONCLUSION

For the foregoing reasons, the court finds that Customs acted unlawfully in prohibiting Ammex from selling duty-free gasoline and diesel fuel, and therefore grants the Motion Of Plaintiff Ammex, Inc. For Judgment Upon The Agency Record. Judgment to this effect shall be entered accordingly.

EVAN J. WALLACH
Judge

Date: August 25, 2000
New York, New York

AMMEX, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Court No.: 99-01-00013

Before: WALLACH, *Judge*

JUDGEMENT ORDER

This case having come before the court upon the Motion Of Plaintiff Ammex, Inc. For Judgement Upon The Agency Record ("Plaintiff's Motion"); the court having reviewed the papers and pleadings on file herein, having heard oral argument by each party, and after due deliberation, having reached a decision herein; now in conformity with said decision, it is hereby

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[12] In addition to arguing that HQ 227385 violates 19 U.S.C. § 1557(a)(1) (1994), Plaintiff argues, *inter alia*, that Customs' determination was unreasonable because it ignored Customs' modern ability to monitor duty-free fuel sales through dyes and license plate monitoring. *See* Plaintiff's Brief at 17-19. Plaintiff also claims that Customs' ban on "unidentifiable fungibles" is at odds with its own regulation governing the accounting for fungible merchandise. *See id.* at 11-12 (discussing 19 C.F.R. § 19.12(f)(2), which provides that "FIFO inventory procedures may be used only for fungible merchandise. For purposes of this section, 'fungible merchandise' means merchandise which is identical and interchangeable for all commercial purposes.").

While these arguments have substantial merit, further discussion is unnecessary, given the court's holding that Customs' ruling violated § 1557(a)(1).

ORDERED ADJUDGED AND DECREED that Plaintiff's Motion is GRANTED; and it is further

ORDERED AND ADJUDGED AND DECREED that U.S. Customs Service Headquarters Ruling 227385 of February 12, 1998, is contrary to law, and hereby set aside; and it is further

ORDERED AND ADJUDGED AND DECREED that 19 U.S.C. §§ 1555 and 1557 allow the duty-free sale of gasoline and diesel fuel from a duty-free enterprise.

EVAN J. WALLACH
Judge

Date: August 25, 2000
New York, New York

NOTICE OF ENTRY AND SERVICE

This is a notice that an order or judgement was entered in the docket of this action, and was served upon the parties ont he date shown below.

Service was made by depositing a copy of this order or judgement, together with any papers required by USCIT Rule 79(c), in a securely closed endorsed penalty cover in a United States mail recaptacle at One Federal Plaza, New York, New York 10007 and addressed to the attorney or record for each party at the address on the official docket in this action, except that service upon the United States was made by personally delivering a copy to the Attorney-In-Charge, International Trade Field Office, Civil Division, United States Department of Justice, 26 Federal Plaza, New York, New York 10278 or to a clercial employee designated, by the Attorney-In-Charge in a writing field with the clerk of the court.

LEO M. GORDON
Clerk of the Court

By STEVE TAROY
Deputy Clerk

Date: August 25, 2000

(Slip Op. 00-109)

ALLEGHENY LUDLUM CORP., ET AL., PLAINTIFFS, *v.* UNITED STATES, DEFENDANT

Court No.: 99-06-00361

[Plaintiffs' Rule 56.2 Motion For Judgment Upon The Agency Record denied.]

(Decided: August 28, 2000)

Before: WALLACH, *Judge*

Collier Shannon Scott, PLLC (*David A. Hartquist, Paul C. Rosenthal, Kathleen W. Cannon, R. Alan Luberda* and *John M. Herrmann*), for Plaintiffs.

Lyn M. Schlitt, General Counsel; *James A. Toupin*, Deputy General Counsel; U.S. International Trade Commission, Office of the General Counsel, (*Shara L. Aranoff*), for Defendant.

OPINION

I

INTRODUCTION

This case is before the court upon Plaintiffs' Rule 56.2 Motion For Judgment Upon The Agency Record, challenging the decision of the U.S. International Trade Commission ("ITC" or "Commission") in *Certain Stainless Steel Plate From Belgium, Canada, Italy, Korea, South Africa, and Taiwan*, Inv. Nos. 701-TA-376, 377, and 379 (Final) and 731-TA-788-793 (Final), USITC Pub. 3188 (May 1999), 64 Fed. Reg. 25,515 (May 12, 1999) ("*Final Determination*"). Plaintiffs challenge two aspects of the *Final Determination*: (1) the ITC's decision that cold-rolled stainless steel coiled plate comprises a "domestic like product" distinct from hot-rolled stainless steel coiled plate; and (2) the ITC's determination that the U.S. cold-rolled stainless steel plate industry was not materially injured by imports of stainless steel cold-rolled plate from Belgium and Canada. For the reasons stated below, the court affirms the Commission's determination.

II

BACKGROUND

In response to a petition filed by affected U.S. industry, on May 28, 1998, the ITC published in the Federal Register a notice of its preliminary determination that there was "a reasonable indication" that a U.S. industry was materially injured by reason of dumped or subsidized imports of stainless steel plate in coils from Belgium, Canada, Italy, Korea, South Africa, and Taiwan. *Certain Stainless Steel Plate From Belgium, Canada, Italy, Korea, South Africa, and Taiwan*, 63 Fed. Reg. 29251 (1998). Following subsequent findings by the International Trade Administration of the U.S. Department of Commerce ("Commerce") that such stainless steel plate was, in fact, being subsidized and/or sold at less than fair value (*i.e.*, "dumped") in the U.S. market, the ITC commenced the final determination that is the subject of Plaintiffs' challenge.[1]

[1] Under the Tariff Act of 1930, U.S. industries may petition for relief from imports that are sold in the United States at less than fair value ("dumped") or which benefit from subsidies provided through foreign government programs. Under the law, Commerce determines whether the dumping or subsidizing exists and, if so, the margin of dumping or amount of the subsidy. The ITC determines whether the dumped or subsidized imports materially injure or threaten to materially injure the U.S. industry or industries.

Two aspects of the *Final Determination* are relevant. First, the majority of commissioners[2] found that two domestic like products corresponded to the imported merchandise (certain stainless steel plate in coils) that Commerce identified as being dumped and subsidized: certain hot-rolled stainless steel plate in coils ("hot-rolled plate") and certain cold-rolled stainless steel plate in coils ("cold-rolled plate"). *Final Determination* at 7.[3] In reaching its determination, the ITC noted, *inter alia*, that cold and hot-rolled plate have "limited interchangeability and different end uses," that cold-rolling involves "substantial additional processing steps," that producers and consumers see hot and cold-rolled plate as separate products, and that prices for cold-rolled plate are generally higher. *Id.* Because it found hot and cold-rolled plate to be distinct products, the ITC separately investigated whether each of the domestic industries producing these products had been materially injured by subject imports of corresponding merchandise. *See id.* at 8.

The second relevant aspect of the *Final Determination* concerns the ITC's finding that the U.S. industry producing cold-rolled plate was not materially injured by imports of cold-rolled plate from Belgium and Canada.[4] Although the ITC observed that cumulated imports of subject cold-rolled plate from these countries had declining average unit values and controlled a large share of the U.S. market, it nevertheless found little interest by domestic producers in selling cold-rolled plate and no indication that such imports had depressed domestic cold-rolled plate prices. *Id.* at 23-24. For these and other reasons, the ITC concluded that the domestic industry producing cold-rolled plate was "not materially injured by reason of cumulated subject imports of cold-rolled plate from Belgium and Canada." Id. at 25.[5]

III

ANALYSIS

A

STANDARD OF REVIEW

In reviewing the *Final Determination*, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in

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[2] Specifically, Vice Chairman Miller and Commissioners Crawford, Hillman, and Askey found two domestic like products, voting in the negative (no injury) with respect to cold-rolled plate. *See Final Determination* at 1 n.2. Chairman Bragg and Commissioner Koplan found one domestic like product, encompassing both hot and cold-rolled plate, that was injured by reason of subject imports. *See id.*

[3] For purposes of its investigation, the ITC defined hot-rolled plate as "all domestic product corresponding to the scope of [Commerce's] investigations except for certain cold-rolled stainless steel plate in coils." *Id.* at 3 n.1. In turn, the ITC defined cold-rolled plate as "all domestic product corresponding to the scope of these investigations that has undergone a cold-reduction process that reduced the thickness of the steel by twenty-five percent or more, and has been annealed and pickled after cold reduction." *Id.*

[4] Because there were no subject imports of cold-rolled plate from Italy, Korean, South Africa and Taiwan in 1997, the ITC found imports of cold-rolled plate from these countries to be "negligible" for purposes of 19 U.S.C. § 1671d(b) (1994) and 19 U.S.C. § 1677(24) (1994). *Id.* at 8 & nn.42 & 43. The ITC accordingly terminated its investigation with respect to such imports without an injury determination. *Id.* at 8-9. Plaintiffs have not challenged this finding.

[5] In comparison, the Commission found that "subject imports have had a significant adverse effect on the domestic industry producing [hot-rolled] plate." *Id.* at 22. This finding is also not at issue.

accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). Substantial evidence is something more than a "mere scintilla," and must be enough evidence to reasonably support a conclusion. *Primary Steel, Inc. v. United States*, 17 CIT 1080, 1085, 834 F. Supp. 1374, 1380 (1993); *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), aff'd, 810 F.2d 1137 (Fed. Cir. 1987). "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A.*, 10 CIT at 404-5, 636 F. Supp. at 966.

B

THE ITC'S LIKE PRODUCT DETERMINATION IS IN ACCORDANCE WITH LAW AND SUPPORTED BY SUBSTANTIAL RECORD EVIDENCE.

To make an injury determination, the ITC first defines one or more domestic like products that correspond to the dumped or subsidized imports identified by Commerce and, in turn, identifies the industry or industries producing these like products. 19 U.S.C. § 1671d(b) (countervailing duties); 19 U.S.C. § 1673d(b) (1994) (dumped merchandise); *see Timken Co. v. United States*, 20 CIT 76, 79, 913 F. Supp. 580, 584 ("[I]n determining whether an industry in the United States is materially injured or threatened with material injury by reason of the subject imports, the Commission must first define the 'like product' in order to determine the relevant 'industry.'"). A "domestic like product" is defined as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation." 19 U.S.C. § 1677(10) (1994). The relevant "industry," in turn, is defined as the "producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product." 19 U.S.C. § 1677(4)(A) (1994).

As noted above, in the *Final Determination* the ITC found that two domestic like products, cold-rolled and hot-rolled plate, correspond to the subject merchandise found by Commerce to be subsidized or dumped into the U.S. market.[6] Plaintiffs advance both legal and factual arguments for why this determination was not in accordance with law or otherwise supported by substantial record evidence. For the reasons set forth below, the court affirms this aspect of the *Final Determination*.

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[6] Although the ITC must accept Commerce's determination as to the scope of the imported merchandise found to be subsidized or sold at less than fair value, the Commission determines what domestic product or products is like the imported articles Commerce identified. *See Hosiden Corp. v. United States*, 85 F.3d 1561, 1567-68 (Fed. Cir. 1996). Accordingly, it is not an abuse of the ITC's authority to define multiple like products which correspond to a single product identified by Commerce. See id. (citing various Court of International Trade decisions recognizing such distinctions); *see also Torrington Co. v. United States*, 14 CIT 648, 747 F. Supp. 744 (CIT 1990), *aff'd* 938 F.2d 1278 (Fed. Cir. 1991) (affirming ITC determination of six like products where Commerce found five classes or kinds of subject merchandise).

1

THE COMMISSION DID NOT ERR IN FINDING SUFFICIENT DOMESTIC PRODUCTION TO INITIATE A LIKE-PRODUCT ANALYSIS FOR COLD-ROLLED PLATE.

Plaintiffs first challenge the like product determination by arguing that the ITC's decision to treat cold-rolled plate as a separate like product is inconsistent with 19 U.S.C. § 1677(7)(C) (1994), which requires the ITC to analyze the volume and price effects of the subject imports, as well as their impact on the production, capacity, sales, profits, employment and investments of the relevant industry. According to Plaintiffs, in order to meaningfully perform such an analysis, "the alleged domestic industry [for purposes 19 U.S.C. § 1677(4)(A)] must necessarily have more than a *de minimis* level of domestic production of the product." Plaintiffs' Reply Brief ("Plaintiffs' Reply" or "Reply") at 2. Here, Plaintiffs claim, "the record evidence indicates *de minimis* production and sales of the subject cold-rolled plate" - a result which, they argue, should have led the ITC to conclude that no domestic cold-rolled plate industry existed. *Id.*

The *Final Determination* shows two bases for the ITC's finding that there was sufficient domestic production to initiate a like-product investigation for cold-rolled plate. First, the majority of commissioners, after noting that cold-rolled plate "was produced for commercial sale and in response to customer orders . . . during every year of the period of investigation,"[7] provided a "*compare*" citation to, *inter alia*, its investigation in *Extruded Rubber Thread from Malaysia*, Inv. No. 753-TA-34, USITC Pub. 3112 (June 1998) ("*Extruded Rubber*"). *Final Determination* at 5 & n.18. In *Extruded Rubber*, the ITC found that food-grade extruded rubber thread did not constitute a separate domestic like product from other extruded rubber thread ("ERT"), since only small, non-commercial quantities of food-grade ERT had been produced in recent years. Second, and in a concurring footnote,[8] Commissioner Crawford noted her view that "it is the fact of production — not the amount — that determines whether there is domestic production . . . . Here, admittedly there is actual domestic production of cold-rolled plate." *Final Determination* at 5-6 n.19 (citing Commissioner Crawford's dissenting views from *Extruded Rubber*).

19 U.S.C. § 1677(7)(C) provides the basic guidelines the ITC must follow in evaluating whether subject imports have materially injured, threatened with material injury, or materially retarded the establish-

[7] Plaintiffs do not challenge these facts.

[8] Because it is not identified as such, footnote 19 does not appear to denote a separate, concurring explanation. At oral argument, however, Defendant's counsel explained that this footnote represents only the view of Commissioner Crawford. Because footnotes 18 and 19 set out different standards for examining domestic production, because footnote 19 specifically cites Commissioner Crawford's dissent in *Extruded Rubber*, and because Plaintiffs did not disagree with this explanation, the court accepts counsel's representation as a reasonable reading of footnotes 18 and 19. *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974) ("While [courts] may not supply a reasoned basis for the agency's action that the agency itself has not given, we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.") (citation omitted). The Commission, however, is cautioned to carefully note when particular statements represent the views of only specific commissioners, lest administrative and judicial resources be wasted clarifying the basis for agency action. *See, e.g., Atchison, Topeka & Santa Fe Railway Co. v. ICC*, 412 U.S. 800 (1973) (remanding agency action for clarification).

ment of a U.S. industry. Nothing in this or any other statute defines a minimum "size" or "amount" of domestic production.[9] Nor do Plaintiffs' arguments persuade the court that an effective application of § 1677(7)(C) requires a specific level of domestic production. While in some instances a dearth of production data may inhibit the ITC's analysis, in others a low level of domestic production may provide a discrete set of data that actually facilitates the Commission's investigation. Where limited production does preclude an effective examination, however, the "product-line provision" of 19 U.S.C. § 1677(4)(D) (1994) allows the ITC to rectify this problem by examining "the production of the narrowest group or range of products, which includes a domestic like product, for which necessary information can be provided." Of course, the ITC may also rely on non-data evidence, such as the testimony of current or potential producers, which can be highly probative on the question of causation. For these and other reasons,[10] the court rejects the idea that, as a general proposition, small or even minute production precludes a meaningful § 1677(7)(C) analysis.

It does not appear that limited domestic production precluded an effective § 1677(7)(C) analysis in this case. Here, the ITC had specific data on domestic production and prices (by means of average unit values) for cold-rolled plate, and was able to resort to product line data to assess the impact of imports on the domestic industry. While, as discussed below, the Commission erred in some of its data analysis, none of these errors were necessarily caused by the "small" level of domestic production. Moreover, for the *Final Determination* the ITC amassed substantial testimony concerning the domestic industry's interest in selling cold-rolled plate that was highly probative of the question of causation. *See infra*, Section III.C.4. The court therefore finds no reason to believe that the low level of domestic production at issue here precluded an effective § 1677(7)(C) analysis, and rejects Plaintiffs' claim accordingly.

2

SUBSTANTIAL RECORD EVIDENCE SUPPORTS THE ITC'S FINDING THAT COLD-ROLLED AND HOT-ROLLED PLATE CONSTITUTE SEPARATE DOMESTIC LIKE PRODUCTS.

Plaintiffs' other like product arguments challenge the evidence underlying the ITC's decision to treat cold-rolled and hot-rolled plate as separate like products.

The ITC's decision under 19 U.S.C. § 1677(10) as to what domestic product (or products) is "like" or "most similar in characteristics and

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[9] *See* 19 U.S.C. § 1677(4)(A) (defining "industry" as simply "the producers as a whole of a domestic like product, or those producers whose collective output . . . constitutes a major proportion of the total domestic production of the product").

[10] By precluding the ITC from finding the existence of a domestic industry when domestic production is nonexistent or *de minimis*, Plaintiffs' argument would appear to prevent the ITC from determining whether "the establishment of an industry in the United States is materially retarded," as it is required to do under 19 U.S.C. § 1671d(b) (countervailing duties) and 19 U.S.C. § 1673d(b) (dumping). Presumably, where the establishment of a domestic industry has been materially retarded by subject imports, there will be little if any actual "production" by that industry.

uses" to the imported "subject merchandise" identified by Commerce is a factual determination, made on a case-by-case basis. *NEC Corp. v. United States*, 36 F. Supp.2d 380, 383 (CIT 1998). The ITC looks for clear dividing lines between possible like products, id., and avoids using minor differences in physical characteristics or uses to distinguish between products. *See* S. Rep. No. 96-249 at 90-91 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 476-77. To this end, the ITC generally considers six factors in distinguishing between products: (1) physical appearance, (2) interchangeability, (3) channels of distribution, (4) customer perceptions, (5) common manufacturing facilities and production employees, and (6) price. *See, e.g., NEC Corp.*, 36 F. Supp. 2d at 383. No single factor is dispositive, and a clear dividing line between products may be found even when some of the six factors point to different conclusions. *See, e.g., Torrington*, 14 CIT at 656, 747 F. Supp. at 753 ("The finding of some similarities among the products delineated by the Commission is not sufficient to overturn the determinations when there is otherwise substantial evidence to support its findings.").

In this case, the ITC found that the majority of factors favored treating cold-rolled and hot-rolled plate as distinct domestic like products, and that only one factor, channels of distribution, clearly pointed to an opposite conclusion. *Final Determination* at 6-7. The ITC found cold-rolled and hot-rolled plate to be separate like products and, accordingly, conducted separate injury determinations for the respective industries producing these products.

Plaintiffs challenge this determination on various grounds, each of which is summarized below. For the reasons that follow, the court upholds the ITC's like product determination as supported by substantial record evidence.

a

Neither the Specific Facts of this Investigation, Nor the ITC's Investigation in Stainless Steel Bar, Required the ITC to Conclude That the Differences in Physical Characteristics Between Cold-Rolled and Hot-Rolled Plate Were "Minor."

In the *Final Determination*, the ITC found that the chemical composition of cold-rolled plate is "generally similar to that of [hot-rolled] plate," insofar as "[b]oth are corrosion resistant and are available in similar dimensions." *Id.* at 6. The ITC also found, however, that cold-rolled plate "generally has a smoother finish with greater freedom from surface imperfections than [hot-rolled] plate, and can also be produced to tighter tolerances than the [hot-rolled] product." *Id.*

After comparing physical attributes, the ITC analyzed what effects the products' respective characteristics had on their "uses" and "interchangeability." The ITC found that while "[a]ll stainless steel plate is used "for tanks and equipment for industries for which the corrosion resistance, heat resistance, and/or ease of maintenance of stainless steel are needed," cold-rolled plate is used in certain speciality

applications "where a smooth surface that can be easily cleaned is essential." *Id.* As examples of such specialized applications, the ITC listed "containers and tanks for food processing, beer making, and dairies." *Id.* Turning to the question of interchangeability, the ITC also found "general agreement that cold-rolled plate in coils can be used for [hot-rolled] plate applications." *Id.* The Commission noted, however, that hot-rolled plate is "generally not interchangeable in applications calling for cold-rolled plate, at least without a further grinding/polishing process, and even then it would be substantially more expensive and may not meet required tolerances." *Id.*

As a result of these findings, the ITC concluded that "because cold-rolled plate differs somewhat from [hot-rolled] plate in surface finish and dimensional tolerances, resulting in limited interchangeability and different end uses . . . we find there to be a clear dividing line between [hot-rolled] plate and cold-rolled plate" *Id.* at 7.

Plaintiffs first argue that the only physical distinctions identified by the ITC were "that cold-rolled plate 'generally' has a smoother finish and 'can' be produced to tighter tolerances." Memorandum Of Law In Support Of Plaintiffs' Motion For Judgment Upon The Agency Record ("Plaintiffs' Memorandum") at 11. According to Plaintiffs, the ITC's decision to differentiate between hot and cold-rolled plate "based on these minor physical differences that may not even exist . . . are inconsistent with the Court's holdings that minor differences in physical characteristics are insufficient to find that different like products exist." *Id.* As support, Plaintiffs note that in a separate investigation, *Stainless Steel Bar*,[11] the ITC expressly rejected the idea that such differences could support a finding of separate like products. *Id.* at 11-12.

Plaintiffs' arguments do not show the ITC's like product determination to be unsupported by substantial record evidence. Whether physical differences between products are "minor" is a factual inquiry that varies from case to case. *NEC*, 36 F. Supp.2d at 383. Here, the ITC did not find that "smoother finish," "greater freedom from surface imperfections" and "tighter tolerances" *per se* distinguish cold-rolled from hot-rolled plate. *See Final Determination* at 7 (characterizing cold-rolled plate as "differ[ing] somewhat from [hot-rolled] plate in surface finish and dimensional tolerances"). Rather, the *Final Determination* makes clear that the ITC found these physical characteristics significant because of their *effect* upon the uses and interchangeability of the two products. In particular, the ITC found that physical differences between the products made hot-rolled plate "generally not interchangeable in applications calling for cold-rolled plate." *Final Determination* at 6.

Because, as will be discussed below, the ITC's findings concerning the "uses" and "interchangeability" of the two products are themselves

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[1] *Stainless Steel Bar from Brazil, India, Japan, and Spain*, Inv. No. 731-TA-678, 679, 681, and 682 (Final), USITC Pub. 2856 (1995) ("*Stainless Steel Bar*").

supported by substantial evidence, the ITC acted reasonably in not finding these physical distinctions to be "minor." Simply put, a reasonable fact finder could view these physical differences as significant since, in the context of this investigation, these differences resulted in limited substitutability between hot-rolled and cold-rolled plate. Plaintiffs have identified no evidence which leads the court to find otherwise.

In this regard, a useful contrast can be drawn to the investigation which Plaintiffs cite as supporting their position, *Stainless Steel Bar*. In *Stainless Steel Bar*, the ITC found that hot-formed and cold-finished stainless steel bar constituted one like product (stainless steel bar) and not separate like products. *Stainless Steel Bar* at § I. In reaching this conclusion, the ITC determined that differences in tolerance and finish between hot and cold-formed stainless steel bar were "important" and distinguished the two products based on a minimum industry standard. *Id.* The ITC, however, also found that

> The further processing involved in cold-finishing does not impart the primary characteristic of all [stainless steel bar], which is corrosion resistance, but rather simply makes the product suitable for its intended use. . . . If tolerance and finish specifications were the key factors in a like product analysis, as respondents argue, then we would arguably need to examine whether hundreds of like products exist since cold-finished [stainless steel bars] vary widely in tolerance and finish, as well as in steel chemistries, cross-sectional configurations, and diameter.

Id.

This conclusion is not inconsistent with the *Final Determination*. In *Stainless Steel Bar*, the ITC found that the different tolerance and finish given to stainless steel bar through the cold-finishing process did not impart the "primary characteristic" of stainless steel bar, corrosion resistance, but "simply [made] the product suitable for its intended use." *Id.* The ITC made this finding, however, in a factual circumstance much different than that in the *Final Determination*. In *Stainless Steel Bar*, the ITC effectively found that there were *not* distinct or different uses for hot-formed and cold-formed stainless steel bar, since 85 % of hot-formed bar was dedicated to the production of cold-finished bar, and much of the remaining 15 % was eventually cold-finished. *Id.* As the Commission noted, "[v]ery little [hot formed stainless steel bar] is used 'as is' by the purchaser." *Id.* In contrast, in the *Final Determination* the ITC found that similar physical differences in the tolerance and finish between hot and cold-rolled plate

did lead to different end uses and limited interchangeability. See Final Determination at 7.[12]

Because of these differences, the court finds no conflict between *Stainless Steel Bar* and the *Final Determination*. Read together, these investigations simply indicate that whether physical differences in finish and tolerances between hot and cold-processed stainless steel products are "minor" varies from case to case, depending on, *inter alia*, the effect that such differences have on the uses and interchangeability of the respective products. *See NEC Corp.*, 36 F. Supp.2d at 384 ("[E]very like product determination must be based on the particular record at issue and the unique facts of each case."). The court therefore finds no basis to Plaintiffs' claim that *Stainless Steel Bar* is incompatible with the *Final Determination*.

b

Record Evidence That the Tight Tolerances and Smooth Finish Associated with Cold-Rolled Plate Could Be Achieved in Hot-Rolled Plate Through Additional Grinding and Finishing Operations Does Not Undermine the ITC's Findings.

As further support for its argument that the physical differences between cold and hot-rolled plate are minor, Plaintiffs note record evidence of the fact that the tight tolerances and smooth finish associated with cold-rolled plate could be achieved in the hot-rolled product through additional grinding and finishing operations. Plaintiffs' Memorandum at 12.

While this evidence might, in isolation, support Plaintiffs' argument that the physical differences between cold and hot-rolled plate are minor, Plaintiffs' argument does not address the ITC's decision to discount its significance in light of other record evidence showing (a) that even after further grinding and polishing, the hot-rolled plate may not meet required tolerances; and (b) that such additional processing would cause the hot-rolled product to be "substantially more expensive" *Final Determination* at 6. In their briefs, Plaintiffs identify no reason why this further evidence does not support, as it appears to, the reasonableness of the ITC's decision to distinguish between cold and hot-rolled plate. Accordingly, because Plaintiffs have not shown that the record evidence, when viewed as a whole, could only reasonably have led to a conclusion that the physical differences

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[12] These different conclusions reflect the different tests at issue in each investigation. In *Stainless Steel Bar*, the ITC examined the "differences in the physical characteristics and functions of the upstream and downstream articles" in the context of applying its finished/semifinished product analysis. *See Stainless Steel Bar* at § I. The ITC employs this analysis, which examines such factors as whether the upstream article (hot-formed stainless steel bar) is primarily dedicated to the production of the downstream article (cold-formed stainless steel bar), in deciding whether there is a single like product. *Id.* In contrast, in the *Final Determination* the ITC examined the physical characteristics and uses of cold and hot-rolled plate in the context of its "traditional six-factor test" for determining whether articles are separate domestic like products, as the Commission had already concluded that "such a small proportion of domestic [hot-rolled] production is cold-rolled" that "it is not appropriate to treat [hot-rolled] plate as a 'semifinished' product." *Final Determination* at 6 & n.20.

Thus, although the ITC confronted similar facts concerning physical characteristics in both investigations, it did so in regard to two tests with distinctly different emphases.

between these products are "minor," there is no reason to disturb the Commission's findings.

c

Plaintiffs' Arguments Concerning Other Factors in the ITC's "Like Product" Determination Do Not Warrant a Remand.

As a final argument against the ITC's like product determination, Plaintiffs identify various pieces of record evidence concerning the end uses, interchangeability, consumer perceptions and manufacturing operations of the two products which, it claims, "warrant[] the conclusion that cold-rolled plate is not a distinct domestic like product from [hot-rolled] plate." Plaintiffs' Memorandum at 12-13.

While the evidence identified by Plaintiffs could merit a lengthy discussion for each factor analyzed by the Commission, such analysis is unnecessary. Simply put, although Plaintiffs are correct to note that significant evidence illustrates the similarity between hot and cold-rolled plate, Plaintiffs' arguments do not address other record evidence identified by the ITC which reasonably distinguishes these products. For example, to illustrate the similarities between the cold and hot-rolled plate, Plaintiffs note evidence that these products are generally sold for the same end uses in the food and chemical processing industry, as well as evidence that cold-rolled plate can be used for hot-rolled applications. *Id.* at 13. Plaintiffs' arguments do not address the fact, however, that in the *Final Determination* the ITC identified other record evidence which illustrates (a) that cold-rolled plate is used in "a limited number of specialized applications" where a smooth, easily cleanable surface is essential,[13] and (b) that hot-rolled plate is generally not interchangeable in applications calling for cold-rolled plate. *Final Determination* at 6. Plaintiffs identify no reasons why this other evidence does not reasonably support the ITC's finding that a clear dividing line can be found between cold and hot-rolled plate, notwithstanding other evidence of the products' similarities. Similarly, in discussing both customer perceptions and manufacturing operations, Plaintiffs do no more than identify record evidence which could arguably have led the ITC to a different conclusion.[14]

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[13] As examples, the ITC noted "tanks for food processing, beer making, and dairies." *Final Determination* at

[14] Concerning manufacturing operations, Plaintiffs argue that the ITC "failed to note that [hot-rolled plate] may also be subject to certain cold-rolling operations," and cite in support their pre- and post-hearing briefs as evidence that [certain] producers reported using a cold-rolled operation in response to hot-rolled plate orders. Plaintiffs' Memorandum at 14-15. This evidence, however, does not show that this overlap in production methods was normal or typical. *See, e.g.*, Petitioners' Posthearing Brief, Attachment 1 at 6 ("[One company] reported that it occasionally used cold-rolling as an alternative production route . . . . [A second company's] further examination . . . revealed that it too used the cold-rolling process to produce a product in response to orders for [hot-rolled] plate prior to 1997."). Moreover, Plaintiffs do not challenge the ITC's finding that cold-reduction takes place on a separate line with different employees, or its finding that the additional annealing and pickling operations performed on cold-rolled plate "is generally performed on a different line than annealing and pickling operations that occur after hot-rolling." *Final Determination* at 7.

As for customer perceptions, Plaintiffs claim simply that "where purchasers reported information in response to a survey not for hot- and cold-rolled plate separately, but for a single product called 'stainless steel plate', the Commission should have concluded that these perceptions further support a single like product finding." Plaintiffs' Memorandum at 14 (citation omitted). This claim, however, does not deal with the ITC's finding that domestic producers and importers "identified varying degrees of difference between [hot-rolled] and cold-rolled plate," or its finding that "customers specifically order cold-rolled product." *Final Determination* at 7.

Simply identifying such evidence, however, without more, does not undermine the Commission's findings. *See Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) ("[Substantial evidence] is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."); *accord Grupo Industrial Camesa v. United States*, 85 F.3d 1577, 1582 (Fed. Cir. 1996) (upholding ITC material injury determination).

Different considerations color the court's analysis of the last two factors challenged by Plaintiffs, channels of distribution and price, but the result is the same. With regard to channels of distribution, Plaintiffs correctly observe that the ITC's finding supports a single like-product determination. The ITC acknowledged as much in the *Final Determination*, stating that "[t]he record does not reflect any differentiation between the channels of distribution for [hot-rolled] and cold rolled stainless steel plate." *Final Determination* at 7. As noted previously, however, no single factor in a like product analysis is dispositive, and a clear dividing line between products may be found even when some of the six factors point to different conclusions. *Torrington*, 14 CIT at 656, 747 F. Supp. at 753. Thus, the fact that evidence concerning the products' channels of distribution supports a single like product determination does not render the Commission's findings to the contrary unsupported by substantial evidence.

Concerning the ITC's last finding, that cold-rolled plate commands a price premium over hot-rolled plate, Plaintiffs argue that the ITC improperly relied on evidence of average unit values. According to Plaintiffs, evidence concerning "average unit values of stainless coiled plate are meaningless because they do not differentiate between the various types of stainless plate products involved." Plaintiffs' Memorandum at 15.

As will be discussed subsequently, the Court of Appeals for the Federal Circuit has held that, because average unit values ("AUVs") may be influenced by changes in the mix of product sales, AUVs will not always provide a reasonable means for the ITC to estimate price changes in conducting its injury determination. *See U.S. Steel Group v. United States*, 96 F.3d 1352, 1364 (Fed. Cir. 1996) (holding that the ITC's ability to rely on AUVs as an indication of falling prices is subject to a rebuttable presumption that the distribution of product sales remains constant).[15] Whether such concerns undermine the reasonableness of the ITC's use of AUVs in its like product determination, however, does not affect the substantiality of the record evidence supporting the Commission's finding. In the *Final Determination*, the ITC, besides noting differences in AUVs, cited testimony from industry representatives that cold-rolled plate sells at higher prices than hot-rolled plate because cold-rolling adds $150 to $200 per ton to the production cost of stainless steel plate. *See* Hearing Tr. at 113 and

[15] AUVs are computed by multiplying the price of a product by the quantity sold, summing these results, and then dividing the sum total by the total number of products sold. *U.S. Steel*, 96 F.3d at 1364.

120 (cited in *Final Determination* at 7 n.35). This evidence itself appears to provide substantial evidence that cold-rolled plate commands a price premium over hot-rolled plate, and Plaintiffs have provided no arguments to indicate otherwise. Thus, even if the ITC erred in relying on a comparison of AUVs,[16] other evidence on prices identified in the *Final Determination* reasonably supports its determination. Cf. U.S. Steel, 96 F.3d at 1364-65 (finding that, even though two commissioners improperly relied on declining AUV figures, other evidence sufficiently supported their threat of material injury determination).

In short, Plaintiffs have not provided a basis for disturbing the ITC's finding that two like products, hot and cold-rolled plate, correspond to the subject merchandise identified by Commerce. Although Plaintiffs have identified a significant amount of record evidence which illustrates the similarities between these products, and could arguably have supported a single like product determination, substantial evidence also supports the ITC's finding that a clear dividing line can be drawn between them. Given this opposing evidence, the court does not find that the Commission abused its discretion, or otherwise erred, in evaluating the record before it. *See NEC Corp.*, 36 F. Supp.2d at 384 ("[T]he Commission has broad discretion in determining whether a particular difference or similarity is minor."). The ITC's finding that cold and hot-rolled plate are separate like products is therefore affirmed.

C

DESPITE ERRORS IN ITS SUBSIDIARY DETERMINATIONS, THE COURT AFFIRMS THE COMMISSION'S FINDING OF NO MATERIAL INJURY.

To make an affirmative injury determination, the ITC must find that "an industry in the United States . . . is materially injured . . . by reason of [the subject] imports." 19 U.S.C. § 1673d(b)(1) (antidumping); 19 U.S.C. § 1671d(b)(1) (countervailing duties). "Material injury" is defined as "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A). In order to show that material injury was "by reason of" subject imports, the ITC must find a "causal — not merely temporal — connection between the [subject imports] and the material injury." *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997). "[E]vidence of de minimis (*e.g.*, minimal or tangential) causation of injury does not reach the causation level required under the statute." *Id.* at 722.

The guidelines established by Congress for analyzing the causal nexus between the subject imports and the potential material injury mandate consideration of at least three factors: (1) the volume of imports, (2) the effect of imports of that merchandise on prices in the United States for like products, and (3) the impact of such merchandise on domestic producers of like products. 19 U.S.C. § 1677(7)(B)(i).

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[16] For purposes of this analysis, the court assumes, without deciding, that the ITC erred in relying on AUVs for making its prices comparison.

Pursuant to 19 U.S.C. § 1677(7)(B)(ii), the Commission may also "consider such other economic factors as are relevant to the determination." No single factor is determinative, and the ITC evaluates all relevant economic factors "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1677(7)(C)(iii). In evaluating the evidence, the "commissioners are free to attach different weight to the various statutory tests which they are required to employ when evaluating the presence or threat of injury." *U.S. Steel*, 96 F.3d at 1362.

In the *Final Determination*, the ITC found that the domestic industry producing cold-rolled plate was not materially injured by reason of subject imports of cold-rolled plate, despite the fact that such imports increased significantly, enjoyed a "dominant market share," and had declining AUVs over the period of investigation. *Final Determination* at 23-24. Essentially, the ITC found that the domestic industry had not been injured by this increase in imports because (a) domestic producers did not experience lost sales or incur adverse price effects due to the cold-rolled imports; (b) the small magnitude of the subject imports were too small to have contributed to the declining health of the domestic industry producing stainless steel plate in coils; and (c) the domestic industry did not consider cold-rolled plate an important part of its business. *See id.* at 23-25.

Plaintiffs advance multiple arguments why the ITC's injury investigation is unsupported by substantial record evidence or otherwise not in accordance with law. For the reasons stated below, the court affirms the ITC's negative injury determination.

1

THE COMMISSION'S "VOLUME" ANALYSIS WAS IN ACCORDANCE WITH LAW AND SUPPORTED BY SUBSTANTIAL EVIDENCE.

a

The Commission Did Not Err in Relying on Alternative Table C-3

19 U.S.C. § 1677(7)(C)(i) directs the ITC, in evaluating whether subject imports have caused material injury to a domestic industry, to "consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant."

In the *Final Determination*, the ITC found the cumulated volume of subject cold-rolled plate imports to be "significant," since subject imports had risen substantially from 1995 to 1998 and controlled a dominant share of the U.S. cold-rolled plate market. *Final Determination* at 23 & n.143 (citing "Alternative Table C-3"). Despite this finding, however, the ITC did not find the volume of cold-rolled imports to be a cause of material injury to the domestic industry. The ITC found the domestic industry's production of cold-rolled plate over the period of investigation to be "very limited," never reaching more than a small percentage of U.S. market share. *Id.* The Commission

also identified record evidence that "the industry itself has characterized cold-rolled plate as a tiny and unimportant part of its business," and noted that "there is no indication that the domestic producers lost market share to subject imports." *Id.*; Plaintiffs' Reply at 10.

Plaintiffs first challenge these findings by arguing that the ITC improperly based its analysis of the market share held by subject imports and the U.S. industry on a document, Alternative Table C-3, that was not part of the record and never provided to their counsel. According to Plaintiffs, although Alternative Table C-3 was cited in footnote 143 of the *Final Determination*, no such document exists in the record filed with the court, nor was this document provided to Plaintiffs when the ITC released its proprietary data under administrative protective order. Plaintiffs' Memorandum at 16-17. Thus, Plaintiffs argue, by relying on Alternative Table C-3, the ITC both (a) relied on non-record evidence, and (b) caused it substantial prejudice by relying on a document upon which it was not allowed to comment.

As to the question of whether Alternative Table C-3 is part of the record, the answer is clear. In relevant part, 19 U.S.C. § 1516a(b)(2)(A) (1994) provides that the record consists of "all information presented to or obtained by the . . . Commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be kept by section 1677f(a)(3) of this title."[17] *See also Beker Indus. Corp. v. United States*, 7 CIT 313, 315 (1984) ("The scope of the record for purposes of judicial review is based upon information which was 'before the relevant decision-maker' and was presented and considered 'at the time the decision was rendered.'") (quoting S.Rep. No. 96-249 at 247-48 (1979), reprinted in 1979 U.S.C.C.A.N. at 633). Under this broad definition, Alternative Table C-3 is part of the record. Alternative Table C-3 was prepared by the Commission's staff shortly before the commissioners' vote on April 22, 1999, and, as evidenced by footnote 143 of the *Final Determination*, was relied on by the plurality of commissioners in support of their findings. Based on these facts, which are undisputed, Alternative Table C-3 clearly constitutes "information presented to or obtained by the . . . Commission during the course of the administrative proceeding."[18] 19 U.S.C. § 1516a(b)(2)(A).

Did, however, the ITC's reliance on this document deprive Plaintiffs of due process? In their Reply, Plaintiffs argue that the last minute creation of Alternative Table C-3 ignored 19 C.F.R. § 207.22 (1999), which required the ITC to provide the parties with copies of its prehearing and final staff reports. According to Plaintiffs, these

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[17] USCIT R. 71(a)(1) tracks the language of § 1516a(b)(2)(A) and requires filing of these documents with the Clerk of the Court.

[18] In their Reply, Plaintiffs argue that Alternative Table C-3 "was created at the eleventh hour (after the record had closed)." Plaintiffs' Reply at 10. Plaintiffs, however, present no argument why the "record had closed" before the commissioners had voted on this investigation, nor do they present any reason why a document that was "presented to . . . the Commission during the course of the administrative proceeding" should be excluded from the record simply because of the lateness of its presentation.

reports "contain the relevant record evidence on which the Commission intends to rely," and are "relied upon by the parties to meaningfully frame issues to the Commission." Plaintiffs' Reply at 10. Thus, Plaintiffs assert, by representing the data in one way to the parties in Table C-3, and relying on Alternative Table C-3 for the *Final Determination*, the ITC "affirmatively misled and deprived the parties of the meaningful participation in the investigation contemplated by the Commission's regulations." *Id.*

> 19 C.F.R. § 207.22 (1999), entitled "[p]rehearing and final staff reports," provides:
>
> (a) Prehearing staff report. The Director shall prepare and place in the record, prior to the hearing, a prehearing staff report containing information concerning the subject matter of the investigation. A version of the staff report containing business proprietary information shall be placed in the nonpublic record and made available to persons authorized to receive business proprietary information under § 207.7, and a nonbusiness proprietary version of the staff report shall be placed in the public record.
>
> (b) Final staff report. After the hearing, the Director shall revise the prehearing staff report and submit to the Commission, prior to the Commission's final determination, a final version of the staff report. The final staff report is intended to supplement and correct the information contained in the prehearing staff report. A public version of the final staff report shall be made available to the public and a business proprietary version shall also be made available to persons authorized to receive business proprietary information under section 207.7.

It is a general rule that an agency must comply with its own regulations. *Oy v. United States*, 61 F.3d 866, 871 (Fed. Cir. 1995); *see also Gulf State Tube Division of Quanex Corp. v. United States*, 21 CIT 1013, 1039, 981 F. Supp. 630, 652 (1997) (recognizing that, since there is no Constitutional right to engage in trade, parties' due process rights in antidumping investigations are those set out in statute or in implementing regulations). Nothing in the facts at bar, however, indicate that the ITC violated 19 C.F.R. § 207.22 by creating Alternative Table C-3. This regulation obligates the ITC to produce and provide the public with a public version (and, when appropriate, a confidential version) of the prehearing and final staff reports. Nothing in this regulation, however, states that all information relied upon by the commissioners must be in the staff report,[19] or that parties have

[19] The Commission's own definition of what constitutes the "record" indicates that there can exist "governmental memoranda" that are not part of the "staff report." *See* 19 C.F.R. § 207.2(f)(1) (1999) (defining the "record" as, *inter alia*, "staff reports, all governmental memoranda pertaining to the case, and the record of ex parte meetings"). *See also Wells Mfg. Co. v. United States*, 11 CIT 911, 921, 677 F. Supp. 1239, 1247 (1987) ("[T]he ITC may, and indeed must, consider all evidence presented which comprises the record, whether or not incorporated in the staff report."); *accord Calabrian Corp. v. U.S. International Trade Comm'n*, 16 CIT 342, 351, 794 F. Supp. 377, 386 (1992) (citing *Wells*).

a right to comment upon every document developed by the Commission's staff prior to the final determination. In fact, the history of this provision makes clear that this regulation does not even entitle parties to see final staff reports before issuance of final determinations.[20] Thus, because Plaintiffs have not alleged that the Commission somehow erred in creating the final staff report or making it available to the public, the court does not find any violation of § 207.22.

Even assuming that the ITC violated § 207.22, however, Plaintiffs have not shown any "prejudice" that could be cured by a remand. Since Plaintiffs essentially allege that the ITC committed a procedural error in relying on a document which, though part of the record, was not included in the final staff report, to obtain relief Plaintiffs must show that they were substantially prejudiced by this error. *See American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) ("'[I]t is always within the discretion of . . . an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of [an agency] in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party.'") (quoting *NLRB v. Monsanto Chemical Co.*, 205 F.2d 763, 764 (8th Cir. 1953)); *United States v. Caceres*, 440 U.S. 741 (1979) (failure of IRS agent to follow IRS electronic recording regulation before recording conversation between taxpayer and agent did not require suppression of tape recordings in prosecution of taxpayer); *Oy*, 61 F.3d at 875 ("Since the requirement at issue is merely procedural, Kemira must establish that it was prejudiced by Commerce's non-compliance with this requirement."); *Belton Indus., Inc. v. United States*, 6 F.3d 756, 761 (Fed. Cir. 1993) (requiring showing of prejudice from Commerce's non-compliance with countervailing duty sunset provision).

In its Response, Defendant notes that the original Table C-3 "inadvertently omitted questionnaire data collected on nonsubject imports," thus "misstat[ing] the market shares of both the subject imports and the domestic like product." Defendant [ITC's] Memorandum In Opposition To Plaintiffs' Motion For Judgment On The Agency Record ("Defendant's Response") at 19. Defendant also observes that the information used to derive Alternative Table C-3 came from two importer questionnaire responses that had previously been made avail-

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[20] This provision formerly provided that "[a] public version of the final staff report shall be made available to the public after the Commission's final determination." 19 C.F.R. § 207.21 (1994). Although this regulation was subsequently amended to delete the language concerning submission of the final staff report "after the Commission's final determination," the history of this amendment shows that it was not meant to provide parties with a right to review or comment upon the staff report prior to issuance of the final determination. *See* Notice of Interim Amendment to Rules of Practice and Procedure, 60 Fed. Reg. 18, 20 (ITC Jan. 3, 1995) ("In furtherance of new section 207.29 [now 19 C.F.R. § 207.30 (2000)], the Commission may adopt a practice of releasing staff reports on or before the disclosure date established pursuant to that section in the event that one or more parties to an investigation or review do not have access to business proprietary information subject to administrative protective order. Section 207.21(b) is therefore amended to delete the clause stating that the public version of the Commission's final staff report will be released 'after the Commission's final determination.' The Commission does not take the position, however, that such a practice is required by section 207.29. Nor does the Commission anticipate that it will necessarily release public copies of staff reports on or before the disclosure date as a general matter.").

able to Plaintiffs' attorneys and economists. *Id.* at 20. Plaintiffs neither challenge these observations, nor argue that Alternative Table C-3 manipulated the record evidence in an unreliable way. In fact, Plaintiffs present no substantive claim that reliance on Alternative Table C-3 was prejudicial; they merely say they were "denied the ability to address the record facts as viewed by the Commission, " without saying what that comment would be. Plaintiffs' Reply at 10.

Without more, the court is left to conclude that Alternative Table C-3 is simply the Commission's attempt to repair incorrect record evidence (the original Table C-3) using other record evidence that had already been provided to the parties. Such action cannot reasonably be said to "prejudice" [21] Plaintiffs.[22] *Cf. Wells*, 11 CIT at 921, 677 F. Supp. at 1247 ("[T]he staff is not required to present the data in the light most favorable to plaintiff. The staff is concerned solely with presenting a complete and accurate picture of the state of the domestic industry for a particular product or products."). In fact, and as Defendant correctly notes, had the ITC not revised Table C-3, Plaintiffs might have been able to seek a remand "on the grounds that the Commission's determination was premised on erroneous facts." Defendant's Response at 20 n.22.

In short, Alternative Table C-3 is properly part of the record of this case, and the ITC's reliance on this document did not deprive Plaintiffs of due process. The ITC's use of Alternative Table C-3 was therefore neither in violation of law nor unsupported by substantial record evidence.

b

Plaintiffs' Argument That the ITC's "Volume" Analysis Confused Hot and Cold-Rolled Plate Production is Best Evaluated as Part of the Court's "Impact" and "Causation" Analyses Below.

Plaintiffs next argue that the ITC, after deciding that cold-rolled plate is a separate like product, improperly examined the volume of cold-rolled imports in relation to *all* domestic production of stainless steel plate. *See* Plaintiffs' Memorandum at 17-19. According to Plaintiffs, the ITC's statement that "the domestic industry's production of cold-rolled plate is very limited and that the industry itself has char-

[21] Prejudice, for purposes of determining whether an error committed by the Customs Service was "harmless," has been defined as "injury to an interest that the statute, regulation, or rule in question was designed to protect." *Intercargo Ins. Co. v. United States*, 83 F.3d 391, 396 (Fed. Cir. 1996).

[22] Particularly since, in the *Final Determination*, the ITC cited the figures contained in Alternative Table C-3 as support for its finding that the rising volume and market share of subject imports was "significant." *Final Determination* at 23. This finding supports Plaintiffs' position, and Plaintiffs have not argued (and it is not obvious) that further consideration of Table C-3 could undermine the Commission's stated reasons for discounting this finding (namely, the fact that the domestic industry's production is "very limited," the fact that the industry has characterized its sales as "tiny and unimportant," and the fact that "there is no indication that the domestic producers lost market share to subject imports," *id.*).

acterized cold-rolled plate as a tiny and unimportant part of its business,"[23] *Final Determination* at 23, is inconsistent with its statutory mandate to analyze the volume of subject merchandise and the impact of those imports on the domestic industry identified (here, the cold-rolled plate industry). Id. at 18 (citing 19 U.S.C. § 1677(4)(A)). As support, Plaintiffs cite *Alberta Pork Producers' Mktg. Bd. v. United States*, 11 CIT 563, 669 F. Supp. 445 (1987), which held that it was inappropriate to combine data for two separate products and industries to analyze injury to one industry alone. Plaintiffs' Memorandum at 18.

In essence, Plaintiffs argue that the ITC improperly examined the effect of the subject imports in regard to the entire stainless steel plate industry, instead of just the industry producing cold-rolled plate. There is little substantive distinction, however, between this argument and Plaintiffs' argument that the ITC failed to properly analyze the impact of subject imports on the domestic cold-rolled plate industry.[24] *See id.* at 26-29. Although addressed to different sections of the *Final Determination*, both arguments attack the rationale[25] used by the ITC for determining that the "significant" volume of subject imports did not adversely impact the domestic industry. Moreover, as Plaintiffs' argument also attacks the ITC's finding that cold-rolled plate production is an unimportant part of the domestic industry's business, this claim is directly relevant to the question, discussed below, of whether such "lack of interest" is a sufficient basis for finding no material injury. Accordingly, because Plaintiffs' argument is closely related to these other questions, the court finds it appropriate to evaluate this argument as part of its "impact" and "causation" analyses in Sections III.C.3 and II.C.4 below.

2

THE COMMISSION'S "PRICE" ANALYSIS IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

In determining whether a domestic industry has been injured by reason of subject imports, 19 U.S.C. § 1677(7)(B) directs the ITC to

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[23] Commissioner Crawford did not join in this statement, but rather joined in only the factual, numerical discussion of the volume of imports in this section. *See Final Determination* at 23 n.144 ("[Commissioner Crawford] does not rely on any analysis of trends in the market share of subject imports or other factors in her determination of material injury . . . . She makes her finding of the significance of volume in the context of the price effects and impact of the subject imports.").

[24] For example, Section III.A. of Plaintiffs Reply, which challenges the ITC's volume analysis, quotes the same statement as that quoted in Section II.C. of Plaintiffs' Memorandum (challenging the ITC's "impact" analysis) and Section III.C. of its Reply (challenging the ITC's application of the "product line" provision). *Compare* Plaintiffs' Reply at 11 *with* Plaintiffs' Reply at 14 *and* Plaintiffs' Memorandum at 27. Specifically, all three sections quote the statement that

> Due to the extremely *small magnitude of subject imports of cold-rolled plate relative to domestic production of all certain stainless steel plate in coils*, we do not find that cumulated subject imports of cold-rolled plate, despite their large share of the cold-rolled market and declining average unit values, are having an adverse impact on the domestic industry.
>
> *Final Determination* at 25 (emphasis added).

[25] Although phrased in slightly different terms, the ITC expressed essentially the same findings concerning "causation" in both the "volume" and "impact" sections of its analysis. *Compare Final Determination* at 23 (citing Hearing Tr. at 50-51 and 114, and Ex. 5 of Petitioners' Post Hearing Brief for the proposition that "the industry itself has characterized cold-rolled plate as a tiny and unimportant part of its business") *with Final Determination* at 24 (citing the same evidence for the statement that "none of these domestic producers actively markets or promotes [cold-rolled plate]"). *See also Final Determination* at 25 (referring to its earlier "volume" analysis and noting that "[a]s discussed above, domestic cold-rolled production remained stable, albeit at a very low level . . . .").

examine, *inter alia*, "the effect of imports of that merchandise on prices in the United States for domestic like products." 19 U.S.C. § 1677(7)(C)(ii) elaborates on this requirement, stating that

> In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether–
>
> (I) there has been *significant price underselling* by the imported merchandise as compared with the price of domestic like products of the United States, and
>
> (II) the effect of imports of such merchandise *otherwise depresses prices to a significant degree or prevents price increases*, which otherwise would have occurred, to a significant degree. (emphasis added).

In the *Final Determination*, the ITC stated that although it "did not collect price comparison data on any cold-rolled plate products," it had data on the AUVs of both domestic and subject import sales of cold-rolled plate. *Final Determination* at 23. Examining this data, which reflects the average price per ton for cold-rolled plate, the Commission found that "[t]he average unit value of cumulated subject imports declined steadily over the period of investigation, beginning at a higher level than that for the domestic like product and falling below in 1997 and interim 1998." *Id.* at 23-24. The ITC also noted that "[t]he average unit value of domestic shipments declined irregularly between 1995 and 1997 and was lower in interim 1998 than in interim 1997." *Id.* at 23. Notwithstanding this evidence, however, the ITC found no clear connection between the domestic price declines and the subject imports, since (a) "during much of the period, the domestic price decreased even though subject imports were priced substantially higher"; and (b) "petitioners did not allege that domestic producers of cold-rolled plate experienced any lost sales or incurred any adverse price effects due to the cold-rolled subject imports." Id. at 24.[26]

Plaintiffs advance three arguments for why this determination is unsupported by substantial evidence, each of which is discussed below.

a

The ITC Did Not Commit Legal Error by Failing to Collect or Use Specific Price Information.

Plaintiffs first argue that the ITC's analysis is in error, both legally and factually,[27] because the ITC failed to gather specific price com-

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[26] Commissioner Crawford concurred in finding that subject imports were not having significant effects on domestic prices, although she did so by comparing the domestic prices that existed when the imports were traded unfairly with what domestic prices would have been had the imports been traded fairly. *See Final Determination* at 24 n.150 and 18 n.108. Plaintiffs do not challenge Commissioner Crawford's analysis.

[27] Although the heading used in Plaintiffs' Memorandum states only that they are challenging the ITC's price findings on substantial evidence grounds, *see* Plaintiffs' Memorandum at 19 (stating, as Heading B.1., that "*The Commission's Failure to Request Pricing Data on Cold-Rolled Plate Renders Its Pricing Analysis Unsupported by Substantial Evidence of Record*"), the substance of their briefs reveals both legal and factual arguments. *See, e.g.*, id. at 20 ("The Commission's failure to collect and analyze pricing information alone, given the statutory mandate . . . renders the Commission's final decision unsupported by substantial evidence of record and not in accordance with law."). Accordingly, the court evaluates both the legal and factual aspects of Plaintiffs' claim.

parison data for domestic and subject foreign cold-rolled plate sales. According to Plaintiffs, "[t]he Commission's failure to collect and analyze pricing information alone, given the statutory mandate [of 19 U.S.C. § 1677(7)(C)(ii)] that the Commission examine the effect of import prices on the U.S. industry, renders the Commission's final decision unsupported by substantial record evidence of record and not in accordance with law." Plaintiffs' Memorandum at 20. As support, Plaintiffs cite *Roquette Freres v. United States*, which stated that "[i]t is incumbent on the ITC to acquire all obtainable or accessible information from the affected industries on the economic factors necessary for its analysis." *Id.* (quoting *Roquette Freres*, 7 CIT 88, 94, 583 F. Supp. 599, 604 (1984)).

As noted above, 19 U.S.C. § 1677(7)(C)(ii) provides that

> In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether__
>
> (I) there has been *significant price underselling* by the imported merchandise as compared with the price of domestic like products of the United States, and
>
> (II) the effect of imports of such merchandise *otherwise depresses prices to a significant degree or prevents price increases*, which otherwise would have occurred, to a significant degree. (emphasis added).

Nothing in this statute states that the ITC must collect or use price comparison data in its analysis. While such data would presumably be collected by the ITC in the normal course, the statute does not require such evidence. Rather, the statute is simply silent as to what evidence the ITC must consider in determining whether there has been "significant price underselling by the imported merchandise as compared with the price of domestic like products," and whether "imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases." Given this silence, the court does not find that the ITC committed legal error by failing to collect or use specific price information.[28] *See Czestochowa v. United States*, 19 CIT 758, 785, 890 F.Supp. 1053, 1075 (1995) ("[T]he statute does not require that the Commission assess the price-depressing effects of imports in any particular manner."); *Iwatsu Electric Co., Ltd. v. United States*, 15 CIT 44, 54, 758 F. Supp. 1506, 1515 (1991) ("Difficulties with, or even impossibility of, direct price comparison do not mandate a negative determination.").

Similarly, the court does not find that the ITC's failure to collect or rely upon specific price data *per se* renders its conclusions unsupported. Whether the ITC's findings on the subsidiary issue of price

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[28] The court finds no need to reach Defendant's claim that the ITC's use of non-price comparison data was justified as a use of facts otherwise available under 19 U.S.C. § 1677e(a)(1994). *See U.S. Steel*, 96 F.3d at 1365-66 ("We need not decide [the issue of 'whose fault it is that the Commission collected the allegedly unrepresentative data'] because Hoogovens has failed to make a threshold showing that the sample data relied on by the Commission was, in fact, not representative.").

effects is supported by substantial evidence depends on whether, in light of the record evidence as a whole, "a reasonable fact finder could have arrived at the agency's decision." *In re Gartside*, 203 F.3d 1305, 1312 (Fed. Cir. 2000). Here, the ITC cited evidence of the AUVs for domestic and (subject) imported cold-rolled plate, as well as evidence that "petitioners did not allege that domestic producers of cold-rolled plate experienced any lost sales or incurred any adverse price effects due to the cold-rolled subject imports," as support for its findings. *Final Determination* at 24. Without reaching the specifics of this evidence, which are addressed below, the court finds no reason why the ITC's reliance on such evidence alone would be unreasonable *per se*. Both AUVs and the domestic industry's own statements concerning its economic condition are important evidence of whether a domestic industry has been, or risks being, injured by subject imports. *See U.S. Steel*, 96 F.3d at 1364, 1366-67 (holding that AUVs constitute a reasonable means of measuring pricing trends, absent a showing that declining AUVs are caused by factors besides falling prices); *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 984 (Fed. Cir. 1994) ("The industry best knows its own economic interests . . . . Indeed an industry's failure to acknowledge an affirmative threat has direct significance."). In fact, in *U.S. Steel* the Federal Circuit explicitly held that trends in AUVs can be a reasonable means of measuring changes in prices in most instances. *See U.S. Steel* at 1364 ("[W]e do not hold, as a general rule, that the Commission may not rely on AUV trends as indicative of corresponding changes in price."). There is therefore no basis for requiring the ITC to collect and consider other evidence,[29] assuming the record evidence already identified reasonably supports its conclusion.[30] It is to this inquiry that the court now turns.

b

The Commission's Use of Average Unit Values to Make Specific Price Comparisons Is Unsupported by Substantial Evidence.

Plaintiffs' next challenge the Commission's use of AUVs in its price

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[29] This is not to say that, had price comparison data been collected by the ITC or put on the record by the parties, the ITC could have ignored such evidence. The substantial evidence standard requires the ITC to consider whether "the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the [agency's] view." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *accord Gerald Metals*, 132 F.3d at 720 (ITC determination). Rather, the court simply holds that the absence of such evidence does not *per se* render the ITC's findings on this subsidiary issue unsupported by substantial evidence.

[30] This finding is not incompatible with idea that the "[i]t is incumbent on the ITC to acquire all obtainable or accessible information from the affected industries on the economic factors necessary for its analysis." *Roquette Freres*, 7 CIT at 94, 583 F. Supp. at 604. While this statement sets forth the standard that must generally guide the Commission in making its injury determinations, particularly when it purports to rely on facts otherwise available, see 19 U.S.C. § 1677m(d) (1994), the court does not read this statement as requiring a level of diligence beyond that required by statute or the substantial evidence test. *See Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1561 (Fed. Cir. 1994) ("While it may be true that the ITC staff might have been more aggressive in pursuing plant-by-plant data . . . , we are not here reviewing the ITC's diligence. . . . Rather, Atlantic Sugar's concerns go to the question of the evidence on the record for the injury determination, as discussed below. If that evidence is insubstantial, then the reviewing court must either reverse the ITC's determination or remand the case for further fact-finding."); *Kenda Rubber Indus. Co., Ltd. v. United States*, 10 CIT 120, 124-26, 630 F. Supp. 354, 357-58 (1986) (finding, in regard to a claim that the ITC improperly found injury to the separate tire and tube industries on the basis of aggregated data, that "[a]lthough ideally an investigation would include such [segregated] data," there was sufficient record evidence "from which a reasonable mind might draw the conclusion that

determination. According to Plaintiffs, record evidence shows that "[p]rices of stainless steel plate products vary significantly depending on the grade, dimensions and finishes of the plate involved." Plaintiffs' Memorandum at 22. Such evidence, Plaintiffs argue, "coupled with evidence submitted by the Belgian producer that the type of cold-rolled plate that it manufactured was different from that made by the U.S. mills," establishes that the imported and domestic cold-rolled plate were not the same products — a fact which "rebut[s] any presumption that AUVs could be used as a proxy for price." *Id.* at 22-23.

In *U.S. Steel*, the Federal Circuit evaluated a similar claim, addressing whether the cold-rolled steel industry comprised so many different products as to make it impossible for trends in AUVs to accurately reflect pricing trends. *See U.S. Steel*, 96 F.3d at 1366. In resolving this question, the court stated:

> [T]he burden here is on Hoogovens to show, by hard evidence, that in this case falling AUVs are not representative of falling prices, but rather are due to some other factor, such as a redistribution in domestic consumption. Hoogovens general allegations that the breadth of products encompassed within the cold-rolled universe precludes reliance on AUVs are not sufficient to meet this burden. We therefore decline to reverse Commissioner Newquist's determination on this ground.

Id. at 1366-67.

This explanation is equally applicable here, insofar as the ITC relied on AUVs as evidence of general price trends. Plaintiffs present no evidence that the declining prices identified by the ITC were caused by shifts in demand from expensive to inexpensive products, or some other non-price factor, as opposed to general changes in prices for domestic and subject cold-rolled plate imports. *See id.* at 1364 (noting that "the Commission's implicit 'constant product distribution' presumption is wholly appropriate in most instances."). Rather, Plaintiffs essentially argue that the ITC failed to compare "apples to apples" because it did not ensure that such factors as the grade, finish, and dimensions of the imported and domestic cold-rolled plate sales were the same before comparing AUVs. While ensuring similarity among such factors would certainly have allowed for more precise, product-specific comparisons, *U.S. Steel* makes clear that the averaging of prices implicit in the calculation of AUVs does not render AUV comparisons unreliable as an indication of *general* price trends. *See id.* at 1364 ("[W]e do not hold, as a general rule, that the Commission may not rely on AUV trends as indicative of corresponding changes in price."). Thus, it was not error for the ITC to use this data as evidence of general price trends.

However, substantial evidence does not support the ITC's use of this data as specific evidence of price underselling. *U.S. Steel* established that AUVs may be a reliable indicators of general price trends,

provided the "product mix" comprising an AUV does not significantly change over time. Here, the ITC went beyond using AUVs as general indicators of price trends, and essentially used the AUVs for specific price comparison purposes. *See Final Determination* at 23-24 and n.149 (finding that the AUV for cumulated subject imports "[began] at a higher level than that for the domestic like product" and then "[fell] below in 1997 and interim 1998"). The Commission then based its finding in part on this comparison, stating that "[t]here is no clear connection . . . since, *during much of the period*, the domestic price decreased even though the *subject imports were priced substantially higher*." *Id.* at 24 (emphasis added). That, the Commission could not do.

The AUVs used by the ITC simply reflected per short ton average prices and, as such, would only have been reliable for direct comparison purposes if the product mix between expensive and inexpensive products (based on such price factors as size, grade, or finish) was similar for both domestic and subject import sales.[31] The limited record evidence concerning cold-rolled prices, however, shows that this was not the case, since the principle Belgian producer of cold-rolled plate exported a wider, more expensive, product than that produced domestically. *See* Posthearing Brief of ALZ, N.V. and Trefilarbed Inc. of 03/29/99 at 6-7 ("The U.S. mills were offering lower prices for their narrower products than ALZ was for its wider product.").[32] Moreover, the small amount of domestic production during the period examined also indicates that AUVs for domestic production were strongly influenced by the particular grade or size characteristics of only a few orders, and did not reflect a broad average. *See* Petitioners' Posthearing Brief of 03/29/99 at 6-7 (noting, *inter alia*, that Allegheny produced only [confidential amount] of cold-rolled plate in 1997 in response to two orders, and that J&L produced only [confidential amount] in 1997 and [confidential amount] in interim 1998).

Thus, because the product mixes of the domestic and foreign merchandise differed, the fact that for much of the period reviewed the AUVs for subject imports were higher than those for domestic cold-rolled plate, without more, says little about whether there was significant price competition between similarly situated cold-rolled products. It was therefore error for the ITC to have relied on comparisons of AUV data as evidence that subject cold-rolled imports were not causing adverse price effects.

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[31] *See U.S. Steel*, 96 F.3d at 1363-64 ("Average values speak only to the attributes of the composite figures in the aggregate. They say nothing about the composite figures individually."). To specifically demonstrate price underselling, or to make a stronger showing of price suppression, the ITC would need to rely on evidence besides AUVs. *Cf. Iwatsu Electric*, 15 CIT at 55, 758 F. Supp. at 1515 (noting testimony from an importer "that prices had been driven down," as well as "several published reports by independent industry analysts indicating that prices declined during the period," as additional data supporting the ITC's price depression finding).

[32] *See also Views of the [ITC]*, Rec. Doc. 266, at 19 (noting that [a significant portion] of the Belgian producer ALZ's exports to the United States in 1997 were greater in width than the cold-rolled product made domestically).

c

The Commission's Finding That Subject Imports Had No Adverse Price Effects Is Unsupported by Substantial Evidence.

Plaintiffs last challenge the ITC's price determination by arguing that the ultimate conclusion it drew from the AUV evidence, that subject imports did not adversely affect domestic cold-rolled plate prices, is unsupported by the record. *See* Plaintiffs' Memorandum at 23. According to Plaintiffs, "[i]t is difficult to imagine how the Commission can conclude that there is no evidence of price depression when the prices of both the imported and domestic products declined significantly, or to determine that imports were not the cause of that price depression when the subject imports were priced lower than the U.S. product for the most recent periods in which the price declines were observed." *Id.* at 24. Plaintiffs also argue that the ITC's conclusion is inconsistent with its findings, based on similar data, concerning hot-rolled plate in the same investigation. *See id.* at 25-26.

In the *Final Determination* the ITC did "not find that subject imports depressed or suppressed the prices of the domestic like product," nor did it "find significant underselling by subject cold-rolled imports." *Final Determination* at 24. The ITC provided two reasons for these findings, the first being that there was "no clear connection between the subject imports and the domestic price declines, since, during much of the period, the domestic price decreased even though subject imports were priced substantially higher." *Id.*

As discussed above, the price comparison underlying this first conclusion is flawed, since it is based on a comparison of AUVs, and not specific prices. Even if the AUV data could have been properly compared, however, the general conclusion the ITC drew from this data is also unsupported. While the fact that "during much of the period, the domestic price decreased even though subject imports were priced substantially higher" might sufficiently answer the question of whether there was "significant price underselling," there is no reason why declining, though higher, prices for subject imports could not have depressed prices or prevented price increases for purposes of 19 U.S.C. § 1677(7)(C)(ii). Presumably, declining prices for subject imports would have such adverse effects, as domestic producers attempt to match falling import prices, and the fact that "domestic price[s] decreased even though subject imports were priced substantially higher," without more, does not show otherwise. Thus, besides relying upon inappropriate evidence for price comparison purposes, the ITC's analysis also fails to adequately explain why this data was not evidence of downward price pressure.[33]

Given these problems, the court turns to the ITC's second reason for finding no adverse price effects: the fact that "petitioners did not

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[33] Because the court agrees with this aspect of Plaintiffs' argument, it need not address Plaintiffs' claim that the Commission's conclusion is inconsistent with its findings, based on similar data, concerning hot-rolled plate. *See* Plaintiffs' Memorandum at 25-26.

allege that domestic producers of cold-rolled plate experienced any lost sales or incurred any adverse price effects due to the cold-rolled subject imports." *Final Determination* at 24. As Defendant correctly observes, what a party says, or does not say, concerning its economic condition can be important evidence of injury or lack thereof. *See Suramerica*, 44 F.3d at 984 (stating, in regard to an ITC threat determination, that "[t]he industry best knows its own economic interests and, therefore, its views can be considered an economic factor. Indeed an industry's failure to acknowledge an affirmative threat has direct significance."). This court has also recognized, however, that anecdotal evidence of price suppression, by itself, may not always be highly probative. *See, e.g., Iwatsu*, 15 CIT at 53 n.15, 758 F. Supp. at 1514 n.15 ("Both commissioners and the court have not always been satisfied that anecdotal lost sales data is highly probative [of price suppression], but neither has it been rejected outright, particularly if it is used corroboratively."); *Lone Star Steel Co. v. United States*, 10 CIT 731, 733, 650 F. Supp. 183, 186 (1986) ("Anecdotal evidence of lost sales and revenue rarely adds distinct information . . . .").

Against this backdrop, Plaintiffs' failure to allege any lost sales or adverse price effects does not constitute substantial evidence supporting the ITC's price determination. As noted earlier, the Commission's AUV and volume data show that prices for both domestic and subject foreign cold-rolled plate fell generally from 1995 to 1998, at the same time subject imports significantly increased their market penetration. Such figures suggest that increasing, low-priced subject imports exerted downward price pressure on domestic prices, and it is unreasonable to say that the lack of corroborating evidence, by itself, indicates otherwise. *See USX Corp. v. United States*, 11 CIT 82, 86, 655 F. Supp. 487, 491 (1987) (holding ITC's sole reliance on the absence of confirmed allegations of lost sales unsupported by substantial evidence). Certainly, inclusion of anecdotal evidence would have strengthened Plaintiffs' claim of price suppression, and the lack of such evidence leaves open the possibility of other causes for the decline in both domestic and subject import prices. The *Final Determination*, however, does not provide any alternative explanation for the price declines, leaving Plaintiffs' failure to allege lost sales or adverse price effects as the only reason for finding no price suppression or underselling. In view of the record as a whole, the court cannot find this evidence substantial. *See Universal Camera*, 340

U.S. at 488 ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.").[34]

In evaluating the ultimate question of whether the evidence relied on by the ITC sufficiently supports its injury determination, therefore, the court will not give weight to this portion of the Commission's findings.

3

THE COMMISSION ERRED IN APPLYING THE "PRODUCT LINE PROVISION."

Plaintiffs' last challenge concerns the ITC's analysis of the impact of subject imports on the health of the domestic industry. As noted above, 19 U.S.C. § 1677(7)(B)(i) mandates that, in addition to examining the volume of subject imports and their price effects in its material injury analysis, the ITC is to examine "the impact of [subject] imports . . . on domestic producers of domestic like products . . . in the context of production operations within the United States." 19 U.S.C. § 1677(7)(C)(iii) elaborates on this requirement, stating that

> In examining the impact required to be considered under subparagraph (B)(i)(III), the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to—
>
> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
> (II) factors affecting domestic prices,
> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,
> (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and

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[34] Defendant's Response cites the evidence noted in footnote 151 of the *Final Determination* as evidence that domestic producers of cold-rolled plate do not set their prices to compete with imports of subject, or even non-subject, cold-rolled plate. *See* Defendant's Response at 25. Had the Commission stated as much in the *Final Determination*, and if the evidence in footnote 151 supported such a finding, this would likely constitute sufficient evidence that the falling domestic prices were not related to falling subject import prices. Footnote 151, however, does not go that far. Rather, it simply notes that "Petitioners' main argument about subject cold-rolled imports at the Commission hearing was the claim that such imports are sold to fill orders for [hot-rolled] plate by foreign producers that are unable to achieve normal [hot-rolled] tolerances," and states that "[t]he Belgian producer responsible for the vast majority of subject cold-rolled imports refuted this claim in its posthearing brief, noting that customers specifically request a cold-rolled product." *Final Determination* at 24 n.151.

> Nothing in the explanation, nor for that matter in the supporting evidence cited in footnote 151, shows that domestic and subject imported cold-rolled plate do not compete based on price. While this explanation shows Plaintiffs' belief that subject imports of cold-rolled plate are interchangeable with domestic hot-rolled plate, the evidence cited in footnote 151 shows that Plaintiffs advanced this point as support for their "like product" argument, and not with regard to its pricing policies. The court therefor reads footnote 151 as simply an explanation that petitioners' main argument before the agency concerned whether hot and cold-rolled plate were like products. Had the ITC intended to draw from this evidence a statement concerning petitioners' pricing of cold-rolled plate, it could and should have said so. Failing such a discernable explanation, however, the court declines to let Defendant's counsel read into the *Final Determination* a rationale not advanced by the commissioners themselves. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) ("The courts may not accept . . . counsel's *post hoc* rationalizations for agency action; . . . an agency's discretionary order [must] be upheld, if at all, on the same basis articulated in the order by the agency itself.").

> (V) in a proceeding under part II of this subtitle, the magnitude of the margin of dumping.
>
> The Commission shall evaluate all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry.

In the *Final Determination*, the ITC found that, while it was able to obtain some of this data for the domestic cold-rolled plate industry, the domestic industry was unable to provide segregated trade and financial data for cold-rolled plate. *Final Determination* at 25. Accordingly, the ITC relied upon the "product line provision," 19 U.S.C. § 1677(4)(D), and "assess[ed] the effect of the cumulated subject imports on the production of the narrowest group of products that includes cold-rolled plate for which the necessary information could be provided — in this case, all stainless steel coiled plate." *Id.* Thus examining data for all domestic stainless steel plate production, the ITC noted that "the domestic industry experienced declining financial performance and capital investment throughout the period as well as declines in employment and capacity at the end of the period." *Id.* Despite this adverse evidence, however, the ITC found that the small magnitude of subject cold-rolled plate imports could not have caused such injury to the domestic stainless steel industry as a whole, stating that

> Due to the *extremely small magnitude of subject imports of cold-rolled plate relative to domestic production of all certain stainless steel plate in coils*, we do not find that cumulated subject imports of cold-rolled plate, despite their large share of the cold-rolled market and declining average unit values, are having an adverse impact on the domestic industry. In light of the limited commercial interchangeability between subject cold-rolled imports and domestic [hot-rolled] plate, which represents the vast majority of domestic production of certain stainless steel plate in coils, we find that *subject cold-rolled imports are too small in magnitude to have contributed to the observed declines in the profitability, employment or capacity of the domestic industry producing certain stainless steel plate in coils*. Accordingly, we determine that the domestic industry producing cold-rolled stainless steel plate in coils is not materially injured by reason of cumulated subject imports of cold-rolled plate from Belgium and Canada.

Id. (emphasis added).

Plaintiffs challenge this application of § 1677(4)(D) by arguing that the ITC improperly examined whether subject imports of cold-rolled plate were responsible for the poor performance of the stainless steel *as a whole*, thus "mixing apples and oranges" and necessitating a nega-

tive injury determination. *See* Plaintiffs' Memorandum at 26-29. The court agrees.

> The statute at issue, 19 U.S.C. § 1677(4)(D), provides that
>
> > The effect of dumped imports or imports of merchandise benefiting from a countervailable subsidy *shall be assessed in relation to the United States production of a domestic like product if available data permit* the separate identification of production in terms of such criteria as the production process or the producer's profits. If the domestic production of the domestic like product has no separate identity in terms of such criteria, then *the effect of the dumped imports or imports of merchandise benefiting from a countervailable subsidy shall be assessed by the examination of the production of the narrowest group or range of products, which includes a domestic like product, for which the necessary information can be provided.* (emphasis added).

This provision makes clear that, when available data permits, the effect of unfairly traded imports is to be assessed in relation to only the U.S. production of the like product defined by the Commission, rather than the production of all products made by the domestic industry producing the like product.[35] The statute also makes clear that, when such segregated data is not available, the effect of the unfairly-traded imports shall be assessed by an examination of economic factors relating to a more aggregate level of production ("product line" data). What is not clear, however, is *how* product line data is to be employed. While § 1677(4)(D) states that the Commission shall assess the effect of unfairly-traded imports only "*in relation to . . . production of a domestic like product* if available data permit[s]," neither the language nor the legislative history of this statute specify the standard against which the ITC is to assess the impact of unfairly-traded imports if forced to rely on product line data. (*i.e.*, whether the broader data is to be used strictly as a proxy). Rather, and in contrast to the situation where segregated data is available, the statute simply gives the general charge that "the *effect* of the [unfairly-traded] merchandise . . . *shall be assessed by the examination*" of product line data.

Notwithstanding this ambiguity, the ITC's interpretation and application of § 1677(4)(D) in this case was unreasonable.[36] The ITC, un-

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[35] *See, e.g.*, S. Rep. No. 96-249 at 83-84 (1979), *reprinted in* 1979 U.S.C.C.A.N. at 469-70 ("In examining the impact of imports on the domestic producers comprising the domestic industry, the ITC should examine the relevant economic factors (such as profits, productivity, employment, cash flow, capacity utilization, etc.), as they relate to the production of *only* the like product, if available data permits a reasonably separate consideration of the factors with respect to production of only the like product.") (emphasis added); *General Motors Corp. v. United States*, 17 CIT 697, 701-02, 827 F. Supp. 774, 780 (1993) (citing 19 U.S.C. § 1677(4)(D) and stating that "[i]n this case, the like product consists of minivans; lost sales of other vehicles are not to be considered.").

[36] Because the court finds the statute ambiguous, the court must determine whether the Commission's actions were based on a permissible (i.e., reasonable) construction of the statute. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

der the guise of using aggregate product line data, changed its basic inquiry from assessing the impact of subject cold-rolled plate imports on domestic production of cold-rolled plate to assessing the impact of such imports on domestic production of all stainless steel plate. In doing so, the ITC made it far more difficult to find material injury, since subject cold-rolled imports would necessarily have less impact on stainless steel production *as a whole* than they would on only production of cold-rolled plate. Moreover, comparing subject cold-rolled imports to total stainless steel production turned the ITC's "like product" determination on its head, by essentially ignoring its decision that cold and hot-rolled plate, and the industries producing these products, are distinct.

Nothing in the last sentence of § 1677(4)(D) reasonably allows such drastic changes. On its face, this provision simply provides that the ITC shall examine aggregate ("product line") data when segregated data is not available; it does not indicate that the unavailability of segregated data should make it less likely that subject imports are adversely impacting the domestic industry defined by the ITC, or that the unavailability of such data should eviscerate its finding of two domestic industries.

Thus, because the ITC's use of product line data pursuant to § 1677(4)(D) made it harder for the domestic cold-rolled plate industry to establish material injury, the court finds neither the ITC's interpretation of this provision, nor its application of product line data, reasonable. While it may be true that subject cold-rolled plate imports did not negatively impact domestic cold-rolled plate production, the ITC's finding that "subject cold-rolled imports are too small in magnitude to have contributed to the observed declines . . . of the domestic industry producing certain stainless steel plate in coils" — by essentially comparing "apples to oranges," rather than "apples to apples" — does not reasonably support this conclusion.[37] The court therefor will not consider this finding in determining whether the Commission's finding of no material injury is adequately supported by the record as a whole. It is to this last question that the court now turn.

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[37] During oral argument, Defendant's counsel argued that the ITC only made this comparison to determine what weight, if any, should be accorded the data. If this was the extent of the Commission's evaluation, such action would not be in error. As the ITC was forced to rely on financial and other information covering all stainless steel production, it was only appropriate that it question the propriety of using such data to measure the impact of subject imports on domestic cold-rolled plate production. Cf. Goss Graphics Sys., Inc. v. United States, 33 F. Supp.2d 1082, 1099 (1998), aff'd 216 F.3d 1357 (Fed. Cir. 2000) ("The Commission has the discretion to assess the probative nature of the evidence obtained in its investigation . . . . ").

> A review of the *Final Determination*, however, shows no such limitation. Not only is there not indication, either explicit or implied, that the ITC'S analysis relates only to the *probative weight* that should be given such product line data, but the language used by the ITC makes clear that its impact analysis was based upon the state of the stainless steel plate industry *as a whole*. *See e.g.*, *Final Determination* at 25 ("*Accordingly*, we determine that *the industry producing cold-rolled stainless steel plate in coils* is not materially injured by reason of cumulated subject imports of cold-rolled plate from Belgium and Canada.") (emphasis added). Thus, while the court finds no fault in counsel's argument that the Commission may evaluate the probative weight of product line data, it declines to find that is all the ITC did here. *See Burlington Truck Lines*, 371 U.S. at 169 ("[A]n agency's discretionary order [must] be upheld, if at all, on the same basis articulated in the order by the agency itself.").

4

THE DOMESTIC INDUSTRY'S LACK OF INTEREST IN THE COLD-ROLLED PLATE MARKET IS SUBSTANTIAL EVIDENCE SUPPORTING THE ITC'S FINDING OF NO MATERIAL INJURY.

Having established that the ITC erred in making various subsidiary findings, the court's last, and ultimate, query is whether any or all of these errors make the ITC's ultimate conclusion "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). To make this determination, the court must disregard those subsidiary findings that are unsupported or otherwise unlawful, and determine whether the remaining evidence relied on by the ITC is such that "it would have been possible for a reasonable jury to reach the [Commission's] conclusion." *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998); *see also U.S. Steel*, 96 F.3d at 1364-65 ("Even if the Commissioners' subsidiary price-suppression finding was not supported by substantial evidence, however, we find that the other evidence relied on by [the commissioners], taken as a whole, was sufficient to support their ultimate conclusion."). Upon close review of this remaining evidence, and in light of the evidence of record which detracts from its substantiality, the court finds sufficient support for the Commission's negative injury determination.

The *Final Determination* reveals essentially three bases for the ITC's finding that, despite rising volume and decreasing AUVs, subject cold-rolled imports did not cause material injury to the domestic cold-rolled plate industry: (1) subject imports did not exert price pressure on domestic prices and, thereby, decrease domestic revenues; (2) subject imports of cold-rolled plate were too small in magnitude to account for the observed declines in profitability, employment and capacity of the domestic stainless steel industry as a whole; and (3) the domestic industry did not consider cold-rolled plate an important part of its business. For the reasons stated above, the court notes that grounds one and two do not reasonably support the ITC's conclusion. The question thus becomes whether the ITC's last stated ground, lack of interest, is sufficient by itself.

The ITC made three statements concerning the domestic industry's interest in selling cold-rolled plate: (a) a statement in its "volume" analysis that "the domestic industry's production of cold-rolled plate is very limited and that the industry itself has characterized cold-rolled plate as a tiny and unimportant part of its business"; (b) a statement in its "impact" analysis that "none of these domestic producers actively markets or promotes the product"; and (c) a statement in its "impact" analysis that "high level marketing personnel from the domestic industry were unaware in some instances that their companies could or did produce a cold-rolled product." *Final Determination* at 23-25. In support of these statements, the ITC cited the following evidence:

- Statements by three domestic producers during the Commission's hearing on March 23, 1999, that they do not see any real market for cold-rolled plate.[38] *See id.* at 23 n.145 and 24 n.153 (citing Hearing Tr. at 50-51);

- A statement by an economic consultant for the domestic industry at the hearing that any domestic production of cold-rolled plate is "accidental." *See id.* at 23 n.145 and 24 n.153 (citing Hearing Tr. at 114);

- A letter from domestic producer J&L Specialty Steel, Inc. listing its cold-rolled plate sales for 1995-98 and noting that "[b]ecause of the small quantity of shipments, and no inventory programs on J&L's part, it should be assumed that shipments equaled production and no beginning/ending inventory existed." *See id.* at 23 n.145 and 24 n.153 (citing Petitioners' Posthearing Brief, Ex. 5);

- A statement by David Pudelsky, Vice-President-Commercial of J&L, indicating that he was not sure whether J&L produces cold-rolled plate in response to cold-rolled orders. *See id.* at 25 n.154 (citing, *inter alia*, Hearing Tr. at 120-21 and comparing Mr. Pudelsky's statement to the later admission that, after research, Allegheny and J&L discovered that they had produced cold-rolled plate during the period of investigation); and

- A statement by Leonard Arnold, Sales Manager for North American Stainless, concerning North American's production of cold-rolled plate that was later admitted to be inaccurate. *See id.* at 25 n.154 (comparing Mr. Arnold's statement that North American produced cold-rolled plate to petitioners' subsequent admission in their Posthearing Brief that North American did not produce this product).

The statements by Robert Rutherford that Allegheny Ludlum has "the capability of making cold-rolled coiled plate, but there just isn't market for it, as we see it," the statement by Leonard Arnold of North American Stainless that "[t]he market for [cold-rolled plate] is almost insignificant," and the statement by David Pudelsky that "J&L does have the ability to make a cold-rolled plate product, but there really has not been a market for that, and that is why we have not produced cold-rolled plate," as well as the other evidence cited in the *Final Determination*, show that the main domestic producers (or potential producers) of cold-rolled plate had little interest in selling this prod-

[38] *See* Hearing Tr. at 50 (statement of Robert W. Rutherford, Senior Vice President-Commercial, Allegheny Ludlum Corp., that Allegheny has "the capability of making cold-rolled coiled plate, but there just isn't market for it, as we see it.") (statement by Leonard Arnold, Sales Manager, North American Stainless, that although "North American Stainless has the capability of producing cold-rolled plate," "[t]he market for this product is almost insignificant, and furthermore, our capability and thickness is rather limited") and 51 (statement by David Pudelsky, Vice-President-Commercial, J&L Specialty Steel, Inc., that "J&L does have the ability to make a cold-rolled plate product, but there really has not been a market for that, and that is why we have not produced cold-rolled plate.").

uct. Such evidence provides a basis for the Commission's conclusion that subject imports did not cause material injury to the domestic cold-rolled plate industry, since it indicates that domestic cold-rolled plate production would have remained minimal even if increasing subject imports had exerted negative price pressures on domestic cold-rolled plate prices. This evidence strongly suggests that any injury to domestic cold-rolled plate production was *caused* not by increasing subject imports, but by the industry's perception that the small market for cold-rolled plate was not worth pursuing.

Is the evidence, however, sufficient to support the Commission's ultimate conclusion? Record evidence detracting from the substantiality of the above includes, most significantly, the fact that over the period of investigation (1) subject imports increased significantly; (2) both domestic and subject import cold-rolled prices declined; (3) domestic production remained minimal; and, to a lesser degree, (4) the entire stainless steel plate industry experienced declining financial performance, capital investment, employment and capacity. *See Final Determination* at 23-25. This evidence does not render the Commission's conclusion unreasonable. Without more, such evidence simply indicates that subject imports *might* be causing injury to the domestic cold-rolled plate production; it neither establishes injury to *cold-rolled* plate production, nor does it demonstrate any link between subject imports and such production. In contrast, the domestic industry's own statements concerning cold-rolled production specifically, by reflecting its views of why domestic production remained minimal, were perhaps the most probative causation evidence before the Commission. *See Suramerica*, 44 F.3d at 984 ("The industry best knows its own economic interests and, therefore, its views can be considered an economic factor. Indeed an industry's failure to acknowledge an affirmative threat has direct significance."); *cf. Oregon Steel Mills Inc. v. United States*, 862 F.2d 1541, 1543-46 (Fed. Cir. 1988) (lack of industry support a sufficient basis for revoking antidumping order). Accordingly, the court finds that a reasonable trier of fact could view this evidence as sufficient, by itself, to support a finding that subject imports were not materially injuring the domestic cold-rolled plate industry.

In their Memorandum, Plaintiffs challenge the ITC's treatment of this evidence by arguing that it improperly combined data for two separate products and industries in analyzing injury to only the cold-rolled plate industry, in violation of 19 U.S.C. § 1677(4)(D). *See* Plaintiffs' Memorandum at 18-19.[39] The ITC's statements that "the domestic industry's production of cold-rolled plate is very limited" and "the industry itself has characterized cold-rolled plate as a tiny and unimportant part of its business," *Final Determination* at 23, do imply that the ITC based its injury determination on the limited size of cold-

[39] Plaintiffs specifically challenge the ITC's statement that "the domestic industry's production of cold-rolled plate is very limited and that the industry itself has characterized cold-rolled plate as a tiny and unimportant part of its business." *Final Determination* at 23.

rolled plate production relative to all domestic stainless steel plate production. Had the Commission drawn such a comparison for purposes of showing no injury to the domestic stainless steel industry *as a whole*, the ITC would be engaging in the kind of inappropriate "apples to oranges" comparison discussed in section III.C.3. above.

The evidence cited in support of these statements, however, as well as the evidence cited in footnotes 153 and 154 of the *Final Determination*, reveals no similar error. The evidence cited in the footnotes, discussed above, concerns *only* domestic interest in, and knowledge of, cold-rolled plate production. *See, e.g.*, Hearing Tr. at 50 (statement of Robert W. Rutherford, Senior Vice President-Commercial, Allegheny Ludlum Corp., that Allegheny has "the capability of making cold-rolled coiled plate, but there just isn't market for it, as we see it."). It neither shows an inappropriate mixing of evidence concerning hot and cold-rolled plate production,[40] nor does it show that the ITC inappropriately compared cold and hot-rolled production to illustrate the relative unimportance of the former. Rather, these statements go simply to the question of whether the cold-rolled plate industry[41] was substantially interested in producing cold-rolled plate — an inquiry which is highly probative of whether subject cold-rolled plate imports caused this industry material injury. The court therefore does not find that the ITC, in analyzing these statements, improperly combined data for two separate products and industries.

As a final challenge to the substantiality of this evidence, Plaintiffs argue that

> [The] Commission's suggestion that the domestic industry has abandoned the cold-rolled plate market because of the industry [sic] were not aware of specific details concerning cold-rolled plate sales is incorrect. No executive could be expected to know details of specific transactions constituting an infinitesimal proportion of a company's business.

Plaintiffs' Reply at 13.

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[40] *Compare Alberta Pork*, 11 CIT 563, 669 F. Supp. 445 (finding that the ITC erred in combine data for two separate products and industries to analyze injury to one industry alone).

[41] Although the ITC referenced *all* stainless steel producers in discussing, *inter alia*, the cold-rolled plate industry's interest in selling cold-rolled plate, *see, e.g.*, *Final Determination* at 24 ("despite the universal ability among domestic [hot-rolled] plate producers to produce cold-rolled plate, none of these domestic producers . . . . Indeed, high level marketing personnel from the domestic industry were unaware . . . ."), by itself this fact does not show a misapplication of § 1677(4)(D). Although the ITC found separate domestic industries for both hot and cold-rolled plate, the record shows that the same producers generally compose both industries, and Plaintiffs have not argued otherwise. *See, e.g.*, *Final Determination* at 5 (noting that "[a]ll domestic producers have the ability to produce cold-rolled stainless steel coiled plate") and 7 ("The production of cold-rolled plate typically begins with [hot-rolled] plate."); *see also* Plaintiffs' Memorandum at 14 (arguing that "[m]anufacturing operations also do not distinguish hot-rolled and cold-rolled stainless plate products.").

> Given this overlap, and in light of the fact that the ITC did not distinguish between the two products in its preliminary determination, it is neither surprising nor *per se* incorrect that the ITC referenced the domestic stainless steel plate industry when referring to cold-rolled plate producers. Nevertheless, because such general references to the "domestic industry" raise questions of whether the ITC inappropriately compared different levels of production in its injury analysis, the ITC is advised to use greater care in specifying the domestic industry it refers to — specifically where, as here, it defines separate like products and domestic industries.

While it may be true that an executive would not generally know "details of specific transactions constituting an infinitesimal proportion of a company's business," it is reasonable to assume that an executive would research his company's production of a product before testifying before the ITC about that product. Moreover, even disregarding the inaccurate statements by David Pudelsky of J&L and Leonard Arnold of North American Stainless about their company's specific production of cold-rolled plate, other record evidence cited by the ITC sufficiently establishes that these executives (as well as Robert W. Rutherford of Allegheny Ludlum) were nevertheless familiar with — and disinterested in — the market for cold-rolled plate. *See, e.g.*, Hearing Tr. at 50 (statement by Leonard Arnold that although North American "has the capability of producing cold-rolled plate," "[t]he market for this product is almost insignificant, and furthermore, our capability and thickness is rather limited") and 51 (statement by David Pudelsky that "J&L does have the ability to make a cold-rolled plate product, but there really has not been a market for that, and that is why we have not produced cold-rolled plate"). The court therefore finds no merit to this final argument, and accordingly concludes that the cold-rolled plate industry's admitted lack of interest in producing cold-rolled plate was a sufficient evidentiary and legal basis for finding no material injury by reason of subject imports.[42]

IV

CONCLUSION

At issue in this case is the often difficult question of when agency action should be affirmed in the face of underlying errors. In one sense, mistakes in an agency's analysis suggest the appropriateness of a remand since, when confronted with a mistake of any significance, there is a possibility that the agency may have sought further information or (if sufficient evidence allowed) even arrived at a different result. Allowing an agency such a "final say" would respect its role as fact-finder, and would presumably result in nearly error-free investigations following remand. It would also, however, entail a rigid and aggressive standard of review going well beyond the substantial evidence test.

As noted above, Congress has charged this court with reviewing findings by the ITC and Commerce to determine if they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence" review, though requiring a thorough evaluation, is largely a

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[42] During oral argument, Plaintiffs' counsel, in response to questions from the court, stated that the domestic industry is concerned with cold-rolled plate production insofar as foreign producers may circumvent an antidumping order on hot-rolled plate by cold-rolling their product. This concern over the substitutability of subject imported cold-rolled plate for domestic hot-rolled plate, however, touches on the propriety of the ITC's like product analysis, and not on whether domestic cold-rolled plate production was injured by subject cold-rolled plate imports. Having found hot and cold-rolled plate to be separate products, the ITC was required to focus on the cause of injury (if any) to *only* domestic *cold-rolled* plate production, and Plaintiffs' explanation fails to mitigate the impact of the executives' statements on this question.

deferential standard. As the Supreme Court recently observed, this standard calls upon the court to "decide whether on [the] record it would have been *possible* for a reasonable jury to reach the [agency's] conclusion." *Allentown*, 522 U.S. at 366-67 (emphasis added). In making this determination, the court must set aside agency action "when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the [agency's] view." *Universal Camera*, 340 U.S. at 488.

In the *Final Determination*, the ITC erred in analyzing the possible price effects of subject imports, as well as the impact (if any) of such imports on the health of the domestic cold-rolled plate industry. Such mistakes, however, do not *per se* require a remand. Rather, under the substantial evidence standard, the court must disregard such unsupported or unlawful subsidiary findings in making its ultimate determination of sustainability. When subtracting such subsidiary findings "leaves so little evidence on the record as to be less than a 'mere scintilla' or less than that which 'a reasonable mind might accept as adequate to support a conclusion,'" remand will lie. *Atlantic Sugar*, 744 F.2d at 1563. Where, however, those remaining facts[43] are such that a reasonable jury could still have reached the agency's conclusion, notwithstanding the record evidence which fairly detracts from its weight, agency action must be affirmed. *See U.S. Steel*, 96 F.3d at 1364-65 ("Even if the Commissioners' subsidiary price-suppression evidence was not supported by substantial evidence, however, we find that the other evidence relied on . . ., taken as a whole, was sufficient to support their ultimate conclusion.").

In this case, the Commission identified significant evidence showing that the domestic cold-rolled plate industry was not interested in producing and selling cold-rolled plate. Even in light of record evidence detracting from the substantiality of this evidence (namely, evidence that subject imports were increasing and had declining AUVs), this evidence is sufficient to support a finding that such imports did not cause material injury to the cold-rolled plate industry. The court therefore denies Plaintiffs' Rule 56.2 Motion For Judgment Upon The Agency Record, and affirms the *Final Determination* here at issue. Judgment to this effect shall be entered accordingly.

EVAN J. WALLACH
Judge

Dated: August 28, 2000
New York, New York

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[43] Of course, those remaining facts must have been identified by the agency in support of its findings. *See Burlington Truck Lines*, 371 U.S. at 169 ("[A]n agency's discretionary order [must] be upheld, if at all, on the same basis articulated in the order by the agency itself.").

ALLEGHENY LUDLUM CORP., ET AL., PLAINTIFFS, *v.* UNITED STATES, DEFENDANT

Court No.: 99-06-00361

JUDGEMENT ORDER

This case having come before the court upon Plaintiffs' Rule 56.2 Motion For Judgement Upon The Agency Record ("Plaintiffs' Motion"); the court having reviewed the papers and pleadings on file herein, having heard oral argument by each party, and after due deliberation, having reached a decision herein; now, in conformity with said decision, it is hereby

ORDERED ADJUDGED AND DECREED that Plaintiff's Motion is DENIED; and it is further

ORDERED AND ADJUDGED AND DECREED that the decision of the U.S. International Trade Commission in Certain Stainless Steel Plate From Belgium, Canada, Italy, Korea, South Africa, and Taiwan, Inv. Nos. 701-TA-376, 377, and 379 (Final) and 731-TA-788-793 (Final), USITC Pub. 3188 (May 1999), 64 Fed. Reg. 25,515 (May 12, 1999), is hereby affirmed; and it is further

ORDERED AND ADJUDGED AND DECREED that all parties shall review the court's Opinion in this matter and notify the court on or before Thursday, September 7, 2000, whether any information contained in the Opinion is confidential, identify any such information, and request its deletion from the public version of the Opinion to be issued thereafter. The parties shall suggest alternative language for any portions they wish deleted. If a party determines that no information needs to be deleted, that party shall so notify the court on or before September 7, 2000.

EVAN J. WALLACH
Judge

Date: August 28, 2000
New York, New York

NOTICE OF ENTRY AND SERVICE

This is a notice that an order or judgement was entered in the docket of this action, and was served upon the parties ont he date shown below.

Service was made by depositing a copy of this order or judgement, together with any papers required by USCIT Rule 79(c), in a securely

closed endorsed penalty cover in a United States mail recaptacle at One Federal Plaza, New York, New York 10007 and addressed to the attorney or record for each party at the address on the official docket in this action, except that service upon the United States was made by personally delivering a copy to the Attorney-In-Charge, International Trade Field Office, Civil Division, United States Department of Justice, 26 Federal Plaza, New York, New York 10278 or to a clercial employee designated, by the Attorney-In-Charge in a writing field with the clerk of the court.

LEO M. GORDON
Clerk of the Court

By STEVE TAROY
Deputy Clerk

Date: September 12, 2000

(Slip Op. 00 - 110)

LIBRAS, LTD., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Court No. 95-01-00014

[Upon remand, Customs's test fails to meet the standards of reliability articulated by the Court of Appeals for the Federal Circuit. The goods shall be reliquidated under HTSUS 5208.42.10.]

(Dated: August 29, 2000)

Law Offices of Elon A. Pollack (*Elon A. Pollack* and *Eugene P. Sands*), for plaintiff.

David W. Ogden, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Bruce N. Stratvert*, Attorney, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Edward Maurer*, of counsel, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service; for defendant.

OPINION

GOLDBERG, *Judge*: This classification case involves 32 bales of cotton fabric imported from India into the United States in 1994. The United States Customs Service ("Customs") tested the fabric according to its "Methodology for the [A]nalysis of Woven Fabric to Determine

Whether Fabric had been Power-loomed or Hand-loomed" (Customs's test). Based on the results, Customs determined the fabric was power-loomed and classified it under subheading 5208.42.40 of the Harmonized Tariff Schedule of the United States ("HTSUS"), dutiable at a rate of 11.4% ad valorem and subject to a quota restriction.

Plaintiff, Libas, Ltd., initiated this action in 1995 to challenge Customs's classification. Plaintiff argued that the fabric was hand-loomed, and should therefore have been classified under HTSUS 5208.42.10, dutiable at a rate of 6% ad valorem. Plaintiff also argued that Customs was required to accept the government of India's certification that the fabric was hand-loomed.

The Court held trial in May, 1996. In its subsequent opinion, *Libas Ltd. v. United States*, 20 CIT 1215, 944 F. Supp. 938 (1996), *aff'd in part and vacated in part*, 193 F.3d 1361 (Fed. Cir. 1999) ("*Libas II*"), the Court sustained Customs's classification. First, the Court held that Customs was not required to accept as dispositive the government of India's certification that the fabric at issue was hand-loomed; in the Court's view, Customs acted within its statutory authority when it independently assessed whether the fabric at issue was hand-loomed or power-loomed. *See* 20 CIT at 1218, 944 F. Supp. at 941. Second, based on the evidence and testimony adduced at trial, the Court determined that the fabric was properly classified as power-loomed. *See* 20 CIT at 1220, 944 F. Supp. at 942.

On appeal, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") affirmed the Court's determination that Customs had the authority to independently assess and reclassify fabric that had been certified as hand-loomed by the Indian government. See Libas II, 193 F.3d at 1364. The Federal Circuit, however, vacated and remanded the Court's determination that the fabric was power-

By statute, Customs's classification of goods is presumed to be correct. *See* 28 U.S.C. § 2639 (1994). The presumption applies to every subsidiary fact necessary to support classification, *see Commercial Aluminum Cookware Co. v. United States*, 20 CIT 1007, 1013, 938 F. Supp. 875, 881 (1996), including the "methods of weighing, measuring, and testing merchandise used by customs officers and the results obtained" therefrom. *Exxon Corp. v. United States*, 462 F. Supp. 378, 381 (Cust. Ct. 1978) (quoting Consolidated Cork Corp. v. United States, 54 Cust. Ct. 83 (1965)), *aff'd* 607 F.2d 985 (C.C.P.A. 1979). An importer may rebut the presumption of correctness by "showing that [Customs's] methods or results are erroneous." Id. at 382 (quoting same). "If a Prima facie case is made out, the presumption is destroyed and the Government has the burden of going forward with the evidence." *Id.* (quoting same).

In this case, Customs's classification of the fabric as power-loomed and the test Customs used to arrive at that determination were both presumed to be correct. The Federal Circuit found that Customs's presumption of correctness had been overcome, however, because "Libas' [sic] argument at trial against the reliability of [Customs's]

test was sufficient to rebut the statutory presumption of correctness accorded Customs classifications." *Libas II*, 193 F.3d at 1366 n.2.

Given this posture, the Federal Circuit found wanting the Court's determination that Customs's classification was correct. In the Federal Circuit's view, the Court relied solely on the results of Customs's test, filed as part of the official record, to conclude that the fabric was power-loomed, *see id.* at 1365, but "did not ascertain whether, or explain why, the Customs test was reliable according to appropriate standards." *Id.* at 1367.

To assess the reliability of Customs's test, the Federal Circuit stated that the Court should have employed the standards articulated by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See Libas II*, 193 F.3d at 1366-67. The *Daubert* standards are: (1) whether a theory or technique, such as Customs's test, has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential rate of error; and (4) whether it is generally or widely accepted. *See Daubert*, 509 U.S. at 593-94. Importantly, the Federal Circuit counseled that the *Daubert* standards bear not only on whether evidence is admissible, but also on how much or how little weight the Court should accord such evidence.[1] *See Libas II*, 193 F.3d at 1366.

In light of the *Daubert* standard, the Federal Circuit found the record before it "insufficient . . . to make a determination of . . . [the] reliability [of Customs's test] with any confidence," and advised that "[f]urther evidentiary hearings are probably called for." *Id.* at 1369. In accordance with those instructions, the Court conducted a hearing to assess the reliability of Customs's test.

At the hearing, defendant failed to establish that its test satisfied any of the *Daubert* standards cited by the Federal Circuit. And while the *Daubert* factors are not a "definitive checklist or test," *Daubert*, 509 U.S. at 593, defendant also failed to demonstrate that its test bears any other indicia of reliability.

According to *Daubert*, one of the "key question[s]" the Court should consider is whether a theory or technique "can be (and has been) tested." 509 U.S. at 593. *Daubert* also directs the Court to "consider the known or potential rate of error" of a theory or technique. *Id.* at 594. In this case, defendant's three expert witnesses stated that, in their opinion, Customs's test was a reliable method for distinguishing between hand-loomed and power-loomed fabric. Defendant failed, however, to demonstrate that Customs's test (1) measures what it

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[1] The Court makes no judgment as to whether the Federal Circuit's determination that *Daubert* bears on weight as well as admissibility is limited to cases in which, as here, the Court is acting as the trier of fact and the evidence at issue is already part of the record. *Cf. Exxon Corp. v. United States*, 45 Fed. Cl. 581, 682 n.206 (Fed. Cl. 1999) (internal citations omitted) ("*Daubert* and *Kumho Tire* are, of course, concerned with the admissibility of expert opinion testimony under Federal Rule of Evidence 702. Here at bar, in contrast, we address the sufficiency of expert opinion testimony already in the record . . . However, our application of the *Daubert* standard of evidentiary reliability is consistent with the 'hard look' doctrine, under which the district courts have a duty to evaluate the reliability of expert opinion testimony, even after such testimony is in the record, in order to determine whether the case should go to the jury. Here at bar, sitting as the trier of fact, this court thinks that it is clear beyond cavil that the *Daubert* reliability standard may properly be taken into consideration in evaluating the probative weight of expert opinion testimony already in the record.").

purports to, and (2) does so within an acceptable rate of error.
The Federal Circuit noted

> that the reliability of the test has not been established by the obvious and natural method of double-blind testing. That would involve running the Customs test on fabric, the source of which was known in some other way, perhaps by direct observation, and determining whether testers who themselves had no knowledge of whether test samples were hand-loomed or power-loomed could reliably distinguish power-loomed from hand-loomed fabric within a respectable rate of error. Testing a methodology in this manner would satisfy two of the Daubert factors, verification and known error rate, and for this reason would enhance confidence in the reliability of the test.

Id. at 1368. When asked by the Court whether Customs's test could be tested in the manner described above, Dr. Irene Good, a specialist in textile and fiber analysis and one of defendant's experts, answered in the affirmative. Yet, defendant presented no evidence that Customs's test had ever been tested in this manner.

In fact, Dr. Desiree Koslin, one of defendant's experts from the trial proceedings, testified that she had tested Customs's test. Yet, prior to applying Customs's test to a given piece of fabric, she knew in advance whether that fabric was hand-loomed or power-loomed. Because she was not "blind" to the correct answer, the Court attaches less weight to Dr. Koslin's testimony that Customs's test is a reliable method for distinguishing between hand-loomed and power-loomed fabrics.[2] *Cf. Ruffin v. Shaw Indus., Inc.*, 149 F.3d 294, 300 (4th Cir. 1998) (finding testimony inadmissible because, among other things, examiner was not "blinded" to which mice were control group members and which were experimental). Moreover, both Dr. Koslin and Ms. Mary Carrillo, Textile Analyst at the United States Customs Laboratory and one of defendant's witnesses at the trial proceedings, testified that Customs's test was 100% foolproof and thus had an error rate of zero. Ms. Carrillo further testified that Customs's test is completely error-free because multiple analysts, each with years of experience and training, apply it to each sample. Ms. Carrillo testified that in her experience, Customs's test has never led to inconclusive results, nor have analysts disagreed as to the origin of a particular fabric.

The Court attaches little weight to Dr. Koslin and Ms. Carrillo's testimony on this point. First, little credence can be accorded the witnesses' belief that Customs's test is foolproof, when the accuracy of Customs's test has never been measured in any scientific way. Second, that Customs analysts never reach different conclusions as to whether fabric is hand-loomed or power-loomed is questionable in

[2] Dr. Koslin also testified that her personal method of examination "dovetails" with Customs's test. Notably, however, Customs did not offer evidence that Dr. Koslin's methodology has itself been tested for accuracy, i.e. that Dr. Koslin is able to identify, without advance knowledge of the correct result, fabric as hand-loomed or power-loomed within an acceptable rate of error.

light of the same experts' testimony that a number of the criteria in Customs's test are "qualitative" or "subjective." Indeed, Customs analysts must use their judgment to determine a number of criteria, such as whether cut fringe is "uniform," variation between areas is "minimal," yarn is "complex," and knots are "minimal." *See* Def.'s Ex. 1. For the foregoing reasons, Customs's test fails to meet *Daubert's* standards of testability and error rate.

Under *Daubert*, "[w]idespread acceptance can be an[other] important factor in" assessing the reliability of a theory or technique. *Daubert*, 509 U.S. at 594. In an attempt to demonstrate such acceptance, defendant offered Exhibit 13, a "Check-Sheet for Identification of Handloom Items." Defendant claimed that the "check-sheet" was used by the Government of India ("GOI") to distinguish between hand-loomed and power-loomed fabrics. Another exhibit purported to show the concordance between the "check-sheet" and Customs's test. *See* Def.'s Ex. 1.

Defendant was unable to authenticate the "check-sheet," however. Although the words "Government of India (GOI)" were handwritten at the top of the document, the government witness testifying at the time, Mr. Richard Crichton of the U.S. Customs Service, did not know who wrote them. The "check-sheet" was also undated and unsigned. Given its uncertain lineage and defendant's failure to offer an affidavit certifying that it was an accurate representation of the actual test used by the GOI, the Court excluded the "check-sheet." *See* Fed. R. Evid. 901 (requiring authentication or identification).

Aside from its attempt to demonstrate the purported similarities between Customs's test and the GOI's, defendant did not offer evidence to show similarities to any other test. Upon examination, Dr. Koslin testified that countries other than the United States and the GOI, such as France, must distinguish between hand-loomed and power-loomed fabrics, yet defendant did not submit a copy of the test used by any other country. And other than the testimony of Dr. Koslin that the methodology she uses and teaches is based on similar factors, defendant did not offer documentation of a test used by any other entity, such as a museum, auction house, conservation organization, private lab, or the American Society for Testing and Materials. In this way, defendant failed to demonstrate that its test enjoyed widespread acceptance among other countries and organizations concerned with distinguishing between hand-loomed and power-loomed goods.

Finally, defendant failed to show that its test has been published and subjected to peer review. *See Daubert*, 509 U.S. at 593. The Supreme Court acknowledged that "[s]ome propositions . . . are . . . of too limited interest to be published," id., and that "[i]t might not be surprising in a particular case . . . that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 151 (1999). It may well be that the community concerned with distinguishing between hand-loomed and power-loomed fabrics is extremely limited.

Nonetheless, the Court comments on this factor because, while not dispositive, "submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected." *Daubert*, 509 U.S. at 593.

According to Ms. Carrillo, Customs's test has never been published outside of the Customs Technical Bulletin. Further, Ms. Carrillo was not aware of any publication that discussed Customs's test, nor did she believe that it had been the subject of peer review. While Ms. Carrillo believed that other labs used tests similar to that of Customs, she could not point to peer review or publication of those tests. And while Dr. Koslin testified that she had tested Customs's test, she did not publish her results.

The bulk of the evidence presented by defendant at trial focused on the test Customs used to determine that the fabric at issue was power-loomed. *See Libas*, 20 CIT at 1218-20, 944 F. Supp. at 942-43. Upon reconsideration, Customs's test does not meet any of the *Daubert* factors, nor did defendant point to any other indicia of reliability. Therefore, the Court now accords the test little weight. Apart from Customs's test, defendant's experts testified that, in their opinion, the fabric was power-loomed. Their personal methodologies for determining this, however, have themselves never been tested, have no known error rate, have never been published, and have never been subjected to peer review. Without reliable evidence, defendant fails to prove that the fabric at issue was power-loomed.

At the original trial, several of plaintiff's witnesses offered compelling testimony that, based on first-hand experience, the fabric at issue was hand-loomed. Plaintiff's main witness, Mary Jane Leland, Professor Emeritus at California State University at Long Beach, testified that the fabric at issue is typical of fabric produced on a hand-powered fly shuttle loom in the Madras area of India. Professor Leland testified that she has observed "skilled master weaver[s who] can loom fabric by hand with results that cannot be distinguished from those obtained by a machine loom." *Libas*, 20 CIT at 1220, 944 F. Supp. at 942. Further, Mr. S. Ponnuswamy, partner in JLC International ("JLC") of Madras, India, testified that JLC purchased the fabric at issue from two master weavers located in Kovur, India. Mr. Ponnuswamy testified that he personally observed similar fabric being hand-loomed in Kovur under the supervision of the master weavers.

Because Customs's test does not meet the standards for reliability, the weight of the evidence now supports the conclusion that the fabric is hand-loomed. Accordingly, the fabric shall be reliquidated under HTSUS 5208.42.10.

RICHARD W. GOLDBERG
Judge

Dated: August 29, 2000
New York, New York.

(Slip Op. 00-111)

TARGET STORES, DIVISION OF HUDSON CORPORATION, PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Court No. 95-04-00376

Before: Richard W. Goldberg, Judge

OPINION AND ORDER

On January 12, 2000, plaintiff Target Stores moved for summary judgment in the above-captioned matter. On March 25, 2000, plaintiff moved the Court to amend its summary judgment motion. On March 31, 2000, defendant United States cross-moved for partial summary judgment. On May 8, 2000, plaintiff responded to defendant's cross-motion for summary judgment and on May 30, 2000, defendant replied to plaintiff's opposition to its cross-motion.

Upon close review of the submitted motion papers, the Court finds a genuine factual dispute that is material to the resolution of the action. In particular, plaintiff offers evidence, based on the results of a scientific test, that the external surface area of the uppers of certain entries[1] are composed of over 90% plastic. Defendant rebuts plaintiff's claim by directing the Court to its own scientific test that purportedly demonstrates that the external surface area of the uppers of the subject entries are not composed of over 90% plastic. Defendant further points out to the Court that its classification, and all underlying factual determinations, are accorded a presumption of correctness. *See* 28 U.S.C. § 2639(a)(1)(1994); *United States v. New York Merchandise Co.*, 58 C.C.P.A. 53, 58, 435 F.2d 1315, 1318 (1970).

Although the Court recognizes that the defendant's classification enjoys a presumption of correctness, the plaintiff has presented substantial contrary facts "*tending* to prove...that the original classification by the [defendant] was erroneous." *Id.*(emphasis added). Thus, there remains a genuine issue of fact to be resolved at trial: whether the external surface area of the uppers of the entries at issue are composed of over 90% plastic. *See e.g.*, *Associated Metals and Minerals Corp. v. United States*, 77 Cust. Ct. 100, 426 F.Supp. 568 (1976). The issue of fact is material because the composition of the external surface area of the uppers of the entries at issue is dispositive to their classification under the Harmonized Tariff Schedule of the United States ("HTSUS").

At trial, the parties will be required to demonstrate the reliability of the conflicting evidence to determine the composition of the external surface area of the uppers. *See Libas Ltd., v. United States*, 193 F.3d 1361 (Fed. Cir. 1999). Therefore, summary judgment is not appropriate for this issue.

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[1] The entries at issue include the following Neo Grande Sandals: girls' sizes 3, 4, 11, 12 and 13; boys' sizes 1, 2, 11, 12, and 13; youths' sizes 3, 4, 5, and 6; men's Greatland sizes 7, 8, 10, and men's Omega sizes 8, 11, 12.

Summary judgment is appropriate, however, with respect to the imported women's shoes sizes 5, 6, 7, 8, and 9 that the defendant has agreed should be reliquidated under subheading 6402.99.15, HTSUS, with a duty rate of 6% ad valorem. Thus, partial summary judgment is appropriate on this issue.

Therefore, upon consideration of plaintiff's motion for summary judgment and brief in support thereof, defendant's response; and defendant's cross-motion for partial summary judgment and brief in support thereof, plaintiff's response, and defendant's reply; and upon all other papers; and upon due deliberation, it is hereby

ORDERED that partial summary judgment for plaintiff is GRANTED with respect to the imported women's shoes sizes 5, 6, 7, 8, and 9;

ORDERED that the imported women's shoes sizes 5, 6, 7, 8, and 9 be reliquidated under subheading 6402.19.15, HTSUS, with any refunds payable by reason of this order paid with any interest provided by law;

ORDERED that partial summary judgment is DENIED for plaintiff in all other respects;

ORDERED that partial summary judgment is DENIED for defendant is all respects; and it is further

ORDERED that plaintiff and defendant confer and jointly submit an amended scheduling order within twenty (20) days of the date of this Order.

SO ORDERED.

_____

Judge

Date: August __, 2000
New York, New York

(Slip Op. 00 - 112)

ROCKNEL FASTENER, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Court No. 97-10-01702

Before: Richard W. Goldberg, Judge

[Plaintiff's motion for summary judgment denied. Defendant's motion for summary judgment granted. Judgment entered for defendant.]

(Dated: August 29, 2000)

Sonnenberg & Anderson (*Steven P. Sonnenberg*), for plaintiff.

David W. Ogden, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch,

Civil Division, United States Department of Justice; *Amy M. Rubin*, Attorney, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Sheryl A. French*, of counsel, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service; for defendant.

OPINION

GOLDBERG, *Judge*: This matter is before the Court on cross-motions for summary judgment. Plaintiff, Rocknel Fastener Inc. ("plaintiff"), challenges the United States Customs Service's ("Customs") classification of certain fasteners as screws "[h]aving shanks or threads with a diameter of 6 mm or more" under subheading 7318.15.80 of the Harmonized Tariff Schedule of the United States (1997) ("HTSUS"). Plaintiff claims the imported fasteners should instead be classified as "[b]olts and bolts and their nuts or washers" under HTSUS subheading 7318.15.20.

The Court exercises jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a) (1994). For the reasons that follow, the Court grants defendant's motion for summary judgment and denies plaintiff's motion for the same.

I.

BACKGROUND

The merchandise at issue consists of 56[1] different industrial, externally threaded fasteners from Japan. *See* Pl.'s Mem. of Law in Supp. of its Mot. for Summ. J. ("Pl.'s Br."), at 1; Def.'s Mem. in Supp. of its Cross-Mot. for Summ. J. and in Opp'n to Pl.'s Mot. for Summ. J. ("Def.'s Br."), at 1. The fasteners are fabricated from metal alloys, *see* Pl.'s Br., at 1; Def.'s Br., at 1, and are designed to hold or fasten components of a finished product together. *See* Pl's Statement of Material Facts to Which There Is No Genuine Triable Issue ("Pl.'s Stmt. Mat'l Facts"), at ¶17; Def.'s Resp. to Pl.'s Statement of Material Facts as to Which There Are No Genuine Issues to Be Tried ("Def.'s Resp. to Pl.'s Facts"), at ¶17.

The fasteners are rod- or pin-shaped, and are threaded on one end. *See* Pl.'s Stmt. Mat'l Facts, at ¶10, ¶12; Def.'s Resp. to Pl.'s Facts, at ¶10, ¶12. The diameter of each fastener's threads measures six millimeters or more. *See* Pl.'s Stmt. Mat'l Facts, at ¶9; Def.'s Resp. to Pl.'s Facts, at ¶9.

The fasteners also have a "head" on the end of the pin opposite the threads. *See* Pl.'s Stmt. Mat'l Facts, at ¶11; Def.'s Resp. to Pl.'s Facts, at ¶11. The fasteners were designed to be, and are installed by, torquing these heads. *See* Def.'s Statement of Additional Material Facts as to Which There Are No Genuine Issues to Be Tried ("Def.'s Stmt. Add'l Facts"), at ¶32, ¶33; Pl.'s Resp. to Def.'s Statement of Material

[1] In their Joint Summary of Part Numbers and Entries at Issue (Oct. 27, 1999), the parties agree that 59 products are at issue. This opinion deals with 56 products, because defendant now contends that samples 2, 9, and 59 should be reclassified. *See* Def.'s Br., at 39 n.37, 40. Samples 2, 9, and 59 are addressed separately in the order accompanying this opinion.

Facts Not in Issue ("Pl.'s Resp. to Def.'s Facts"), at ¶32, ¶33.

Plaintiff entered the subject fasteners into the United States between March 14, 1997 and May 7, 1997. On August 1, 1997, Customs liquidated the fasteners under 7318.15.80 at a rate of 8.9% ad valorem. On August 21, 1997, plaintiff filed a protest, claiming the fasteners should have been classified under 7318.15.20, subject to a duty rate of 0.3% ad valorem. Customs denied the protest on September 18, 1997, after which plaintiff timely filed this action.

II.

Standard of Review

This case is before the Court on cross-motions for summary judgment. Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *See* USCIT R. 56(d).

The "[c]lassification of goods entails a two-step process: (1) ascertaining the proper meaning of specific terms in the tariff provision; and (2) determining whether the merchandise in question comes within the description of the properly construed terms." *Hewlett-Packard Co. v. United States*, 189 F.3d 1346, 1348 (Fed. Cir. 1999). In this case, the parties agree on the physical characteristics of the imported fasteners. Thus, the Court must determine only "the proper meaning and scope of the relevant provisions." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 (Fed. Cir. 1999). Because the meaning of tariff terms is a question of law, *see id.*, summary judgment is appropriate in this case.

In reviewing Customs's classification, the Court must determine the correct classification for the subject merchandise. *See Jarvis Clark Co. v. United States*, 733 F.2d 873, 878, 2 Fed. Cir. (T) 70, 75 (1984). Its review of Customs's classification ruling is de novo. See 28 U.S.C. § 2640 (1994). Ordinarily, classification rulings are entitled to a statutory presumption of correctness. *See* 28 U.S.C. § 2639(a)(1) (1994). Because the Court is faced with a question of law on motions for summary judgment, however, no presumption of correctness attaches to Customs's classification. *See Universal Elecs. Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997). In addition, the Court does not apply Chevron deference to Customs's classification rulings. *See Carl Zeiss*, 195 F.3d at 1378; *Mead Corp. v. United States*, 185 F.3d 1304, 1307 (Fed. Cir. 1999), *cert. granted*,120 S. Ct. 2193 (U.S. May 30, 2000) (No. 99-1434).

III.

Discussion

Plaintiff claims the subject fasteners should be classified as bolts under subheading 7318.15.20. In support of its argument, plaintiff relies on general dictionary definitions and its understanding of prior case law.

Defendant asserts that the subject fasteners are properly classified

as screws under subheading 7318.15.80. As the basis for its classification, defendant relies on ANSI/ASME Standard B18.2.1 (1981) ("the Standard"), which identifies screws and bolts according to primary and supplementary design characteristics.

The starting point in every classification case is the tariff schedule. Accordingly, the Court begins by examining the structure of the statute. Next, the Court considers the specific tariff provisions in question, and in particular, the meaning of the tariff terms "bolt" and "screw." After reviewing dictionary definitions, fastener industry standards, and judicial precedent, the Court concludes that the common and commercial meaning of bolt and screw is embodied by ANSI/ASME Standard B18.2.1. Because the subject fasteners are screws as defined by the Standard, the Court concludes that Customs's classification is correct.

A. *Congress Intended That Customs Distinguish Bolts From Screws*

Before turning to the specific tariff terms at issue in this case, it is important to examine the structure of heading 7318. The relevant portions of Heading 7318 are:

7318	Screws, bolts, nuts, coach screws, screw hooks, rivets, cotter pins, washers (including spring washers) and similar articles, of iron or steel:
	Threaded articles:
	*** *** ***
7318.15	Other screws and bolts, whether or not with their nuts or washers:
7318.15.20	Bolts and bolts and their nuts or washers entered or exported in the same shipment
	*** *** ***
7318.15.40	Machine screws 9.5 mm or more in length and 3.2 mm or more in diameter (not including cap screws)
7318.15.50	Studs
	*** *** ***
	Other:
7318.15.60	Having shanks or threads with a diameter of less than 6 mm
	*** *** ***
7318.15.80	Having shanks or threads with a diameter of 6 mm or more
	*** *** ***

7318, HTSUS (1997 ed.).

In conformance with the general organization of the tariff schedule, heading 7318 encompasses a number of like items. And like all tariff headings, heading 7318 is broken out into six and eight digit subheadings for classification of articles thereunder. In particular, six-digit subheading 7318.15 applies to both "other screws" and "bolts." The first eight-digit provision under that subheading, 7318.15.20, applies only to bolts. For purposes of classification under 7318.15, then, Congress clearly considered bolts and screws to be different articles, and intended Customs to classify them under separate provisions. As a corollary to this, a fastener cannot be both a bolt and a screw, but must be one or the other.

B. *The Common and Commercial Meaning of Bolt and Screw*

Having established that Congress intended Customs to distinguish "bolts" from "other screws," the Court now turns to the meaning of those terms. Neither the HTSUS nor its legislative history define bolt or screw. Therefore, each term must be construed according to its common and commercial meaning, which are presumptively the same. *See Mead Corp.*, 185 F.3d at 1308.

The Court may utilize a number of sources to ascertain the common and commercial meaning of bolt and screw, including dictionaries of general usage, scientific authorities, witness testimony, "its own understanding of the term," *see Sabritas, S.A. de C.V. v. United States*, 22 CIT __, __, 998 F. Supp. 1123, 1127 (1998), and "other reliable information sources." *Mead Corp.*, 185 F.3d at 1308. In cases such as this, courts often looks to industrial or commercial standards for guidance in interpreting tariff terms. *See, e.g., North Am. Processing Co. v. United States*, 23 CIT __, __, 56 F. Supp. 2d 1174, 1180 (1999) (deeming USDA regulations "persuasive" support for the common and commercial meaning of "meat"); *THK America, Inc. v. United States*, 17 CIT 1169, 1174, 837 F. Supp. 427, 432 (1993) (consulting American National Standard AFBMA Standard Terminology for Antifriction Bearings and Parts for the common and commercial meaning of "ball bearing"); *Washington Int'l Ins. Co. v. United States*, 16 CIT 873, 875, 803 F. Supp. 420, 422 (1992) (consulting American Society for Testing and Materials standards to define various headnote terms), *aff'd* 24 F.3d 224 (Fed. Cir. 1994); *see also Arthur J. Humphreys, Inc. v. United States*, 973 F.2d 1554, 1559 (Fed. Cir. 1992) (stating that "[i]ndustrial or commercial standards are useful in ascertaining the commercial meaning of a tariff term").

1. *ANSI/ASME Standard B18.2.1 Embodies the Common and Commercial Meaning of Bolt and Screw*

The Court first looks to dictionaries for the common and commercial meaning of the term bolt. Most generally, Webster's New World Dictionary defines bolt as "a threaded metal rod or pin for joining parts, having a head and usually used with a nut." 157 (3d ed. 1988).

Similarly, Millwrights and Mechanics Guide describes a bolt as "an externally threaded fastener designed for insertion through holes in assembled parts. . . . [that] is normally tightened and released by turning a mated nut." Pl.'s Br., at 12 (quoting Millwrights and Mechanics Guide 371 (4th ed. 1986)). The American Heritage Dictionary of the English Language defines bolt, in greater detail, as "[a] fastener consisting of a threaded pin or rod with a head at one end, designed to be inserted through holes in assembled parts and secured by a mated nut that is tightened by applying torque."[2] 213 (3d ed. 1996). Finally, the McGraw-Hill Concise Encyclopedia of Science & Technology defines bolt as

> A rod, usually of metal, with a head at one end and a screw thread on the other. A bolt is used to fasten objects together. A bolt is passed through clearance holes in two or more parts, a nut is engaged on the threaded end, and the parts are drawn together.

264 (2d ed. 1989).

In broad terms, these definitions suggest that a bolt is designed to function in the following manner: (1) it is inserted into a preexisting hole, (2) a nut is joined on the end, and (3) the nut is turned, such that it compresses together the parts to be joined. At the very least, the characteristic identified by every one of the foregoing definitions is that a bolt is normally meant to be used with a nut. Plaintiff cautions, however, that "there is no requirement that a bolt be used with a nut." Pl.'s Br., at 11. In plaintiff's view, a bolt is simply "a rod which [sic] fastens two or more objects together." Pl.'s Br., at 9.

Turning to the tariff term "screw," Webster's New World Dictionary defines it as "a mechanical device for fastening things together, consisting essentially of a cylindrical or conical piece of metal threaded evenly around its outside surface with an advancing spiral ridge and commonly having a slotted head: it penetrates only by being turned, as with a screwdriver." 1206. Similarly, The American Heritage Dictionary of the English Language defines screw as "a. A cylindrical rod incised with one or more helical or advancing spiral threads . . . 2. A metal pin with incised threads and broad slotted head that can be driven as a fastener by turning with a screwdriver . . . ." 1622 (3d ed. 1996). Finally, Millwrights and Mechanics Guide states that "[a] screw is supposed to mate with an internal thread into which it is tightened

[2] Similarly, Webster's II New Riverside University Dictionary defines bolt as "[a] fastener having a threaded pin or rod with a head at one end, designed to be inserted through holes in assembled parts and secured by a mated nut that is tightened by application of a torque." Def.'s Br., Campanelli Decl., ¶10 (quoting Webster's II New Riverside University Dictionary 188 (1984)).

or released by turning its head." Pl.'s Br., at 12 (quoting Millwrights and Mechanics Guide 371 (4th ed. 1986)). Plaintiff offers no definition for the common and commercial meaning of the term screw.[3]

Based on the foregoing dictionary definitions, it appears that bolts and screws are designed to perform their fastening function in different ways: bolts by torquing a nut, and screws by torquing the head. According to plaintiff, however,

> [f]rom a common meaning standpoint, it is irrelevant whether the subject merchandise is used with a nut or whether it is driven by the head. The common meaning of the term "bolt" includes such fasteners regardless of whether they are used with a nut, as indicated by the explanation that bolts are usually, but not always, required to be so used. It is also evident that screws may be used with nuts, and still remain "screws."

Pl.'s Br., at 12 (citations omitted). To illustrate this point, plaintiff offers a quote from Millwrights and Mechanics Guide.

> The bolt is described as an externally threaded fastener designed for insertion through holes in assembled parts. It is normally tightened and released by turning a mated nut. A screw differs from a bolt in that it is supposed to mate with an internal thread into which it is tightened or released by turning its head. These definitions obviously do not always apply, since bolts can be screwed into threaded holes and screws can be used with nuts.

Id. (quoting Millwrights and Mechanics Guide 371 (4th ed. 1986)).

Plaintiff's observation that common definitions of bolt and screw are often inconsistent or ambiguous and obscure the distinction between the two fasteners is well taken. In order to classify the fasteners at issue then, the Court must look to more precise sources, to foreclose the ambiguities latent in dictionary definitions. *See United States v. Spiegel Bros. Corp.*, 51 C.C.P.A. 69, 73 (1964) (consulting a "more precise source[]" for the common meaning of pliers); *see also Marcor Dev. Corp. v. United States*, 20 CIT 538, 547, 926 F. Supp. 1124, 1134 (1996) (rejecting vague or overly broad dictionary definitions as common meaning). Accordingly, the Court turns to fastener industry standards for bolts and screws.

ANSI/ASME Standard B18.2.1 provides a well-recognized, compre-

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[3] The source of plaintiff's complete neglect of the term screw may be its reliance on its assertion that 7318.15.80 is a "basket" provision that is, by definition, subordinate to 7318.15.20, an eo nomine provision. Plaintiff asserts that because the subject fasteners fall within a broad definition of the term "bolt," and because the provision for bolts, 7318.15.20, is more specific than 7318.15.80, the fasteners *must* be classified as bolts under 7318.15.20. *See* Pl.'s Br., at 6-7.

> Because bolts must be distinguished from other screws for purposes of classification under subheading 7318.15, whether 7318.15.80 is an eo nomine or basket provision is irrelevant. If a fastener is a bolt, it must be classified under 7318.15.20, the eo nomine provision for bolts. If a fastener is not a bolt, however, it cannot be classified under 7318.15.20 under any circumstances; it must be classified elsewhere under subheading 7318.15. This is true regardless of whether the alternative provisions under 7318.15 are eo nomine or basket provisions. Thus, even assuming plaintiff is correct in asserting that 7318.15.20 takes precedence over 7318.15.80, it is of no consequence.

hensive basis for the common and commercial meaning of bolt and screw. It defines a bolt as "an externally threaded fastener designed for insertion through holes in assembled parts, and is normally intended to be tightened or released by torquing a nut." Def.'s Br., Ex. A (ANSI/ASME B18.2.1), ¶2.1. The same Standard defines screw as "an externally threaded fastener capable of being inserted into holes in assembled parts, of mating with a preformed internal thread or forming its own thread, and of being tightened or released by torquing the head." *Id.* ¶2.2. These definitions of bolt and screw reflect the commonalities of the dictionary definitions of bolt and screw noted previously by the Court.[4]

The Standard's primary and supplementary criteria put a finer point on the foregoing definitions. The criteria focus on design characteristics; that is, bolts and screws are identified based on their physical properties for use, not the manner in which they are actually used. *See id.* ¶3 (stating that a fastener that has a majority of specified design characteristics is a screw "regardless of how it is used in its service application"). Under the Standard, then, the issue is not whether a fastener is ultimately screwed into threaded holes or used with a nut, but whether it is *designed* to be screwed into threaded holes or used with a nut.

Defendant relies on ANSI/ASME Standard B18.2.1 as the common and commercial meaning of bolt and screw. Defendant's affiants refer to it variously as "the recognized standard in the United States," Def.'s Br., Vass Decl., ¶15 (Affidavit of Steven Vass, Product Engineering Manager for Lake Erie Screw Corporation and Chairman of the ANSI/ASME B18.2 Committee for Externally Driven Fasteners), and "the national consensus standard." Def.'s Reply Br., Wilson Decl., ¶3 (Affidavit of Charles J. Wilson, Director of Engineering, Industrial Fastener Institute). Plaintiff acknowledges that "ANSI/ASME standards are recognized and adopted as American National Standards." Pl.'s Br., at 22.

According to defendant's affiants, ANSI/ASME Standard B18.2.1 "is in wide use in all areas of American industry." Def.'s Br., Hubbard Decl., ¶8 (Affidavit of John Hubbard, engineering manager for Rockford Fastener, Inc. and chairman of the Industrial Fastener Institute Small Products Engineering Committee); *see also* Def.'s Br., Vass Decl., ¶15. The Standard is published by the Industrial Fasteners Institute (IFI) in its *Fastener Standards* handbook,[5] which the preface describes as "a 'BIBLE' for designers, manufacturing engineers, and managers in all industries." Def.'s Br., Ex.D (preface to *Fastener Standards* (6th ed.)).

In sum, all of defendant's affiants believe the ANSI/ASME Standard

[4] The Standard's definitions are also consistent with Harmonized Commodity Description and Coding System Explanatory Note 73.18(A) (2d ed. 1996), which states that "[a] bolt is designed to engage in a nut, whereas screws for metal are more usually screwed into a hole tapped in the material to be fastened." The Court may consult the Explanatory Notes to determine the common meaning of tariff terms because while they "do not constitute controlling legislative history . . . [they] nonetheless are intended to clarify the scope of HTSUS subheadings and to offer guidance in interpreting subheadings." *Mita Copystar Am. V. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994).

[5] Customs also publishes this standard in its handbook "What Every Member of the Trade Community Should Know: Distinguishing Bolts From Screws." *See* Def.'s Br., Ex. B, 2 - 11.

B18.2.1 "reflect[s] the common and commercial understanding of the terms bolts and screws, as well as the common and commercial understanding of the distinctions between bolts and screws." Def.'s Br., Vass Decl., ¶16; *see also* Def.'s Br., Hubbard Decl., ¶7. And, while plaintiff's affiants contend that the subject fasteners are bolts, none of them dispute that ANSI/ASME B18.2.1 is the prevailing standard in the United States for bolts and screws.[6]

Furthermore, ANSI and ASME's expertise in the field of fasteners is well-recognized. *See, e.g., Hafele Am. Co. v. United States*, 18 CIT 1096, 1098, 870 F. Supp. 352, 355 (1994) (citing ANSI/ASME Standard B18.2.1 for the meaning of screw); *S.I. Stud, Inc. v. United States*, 17 CIT 661, 669-70 (1993) (relying on the American Society of Mechanical Engineers (ASME) American Standard Glossary of Terms for Mechanical Fasteners, ASA B18.12 (1962) to determine whether fasteners were bolts or studs), *aff'd* 24 F.3d 1394 (Fed. Cir. 1994); *Advel Corp. v. United States*, 73 Cust. Ct. 200, 204 (Cust. Ct. 1974) (referring to ASME's Glossary of Terms for Mechanical Fasteners as an "authoritative technical source[]" for the common meaning of rivets). For all of these reasons, the Court finds that ANSI/ASME B18.2.1 embodies the common and commercial meaning of the terms bolt and screw.

2. *Plaintiff's Objections to Customs's Classification Fail*

Plaintiff argues that the common and commercial meaning of bolt and screw cannot be derived from ANSI/ASME Standard B18.2.1 for several reasons. Plaintiff insists that the common and commercial meaning of bolt and screw be derived from dictionary definitions alone. Plaintiff also argues that ANSI/ASME B18.2.1 is the equivalent of a commercial designation that must be definite, uniform and general, that the Standard is outdated, and that it is inapplicable because the subject fasteners are custom-made and used in automobiles.

a. *Plaintiff's proffered definition for bolt is unacceptably vague*

Plaintiff argues that the common meaning of bolt must be ascertained from dictionaries of general use. Plaintiff cites Webster's Third New International Dictionary, which defines bolt as "[a] rod or heavy pin (as one made of steel) designed to fasten two or more objects (as metal plates) together and hold one or more objects in place often having a head at one end and a screw thread cut upon the other end and being usu. secured by a nut or by riveting." Pl.'s Br., at 9 (quoting Webster's Third New International Dictionary [no page specified] (1986)). Similarly, plaintiff cites another dictionary that defines bolt as "a stout metallic pin used for holding objects together, frequently

[6] Plaintiff's affiants do not refute that ANSI/ASME B18.2.1 is the national standard for bolts and screws, nor do they claim that (1) according to the Standard, all of the subject fasteners are bolts; or that (2) the subject fasteners are known as bolts throughout the fastener industry. The sum and substance of the affidavits offered by plaintiff is that Rocknel, its Japanese vendor, and Rocknel's customers (Japanese automakers), refer to the subject fasteners as bolts in their purchase orders, specifications, and manuals. *See, e.g.*, Pl.'s Br., Vaughn Decl. (Purchasing Manager, Rocknel Fastener, Inc.); Pl.'s Br., DeRango Decl. (Sales Manager, Rocknel Fastener, Inc.). As plaintiff acknowledges, such evidence is "not necessarily controlling." Pl.'s Br., at 21.

screw threaded at one extremity to receive a nut." Pl.'s Br., at 9 (quoting Lexicon Webster Dictionary 110 (1983)). Plaintiff claims that taken together with similar definitions, these definitions establish that a bolt is "a rod which [sic] fastens two or more objects together." Pl.'s Br., at 9.[7] Plaintiff's experts offer no definition for the term bolt. And, as previously noted, plaintiff offers no definition for the term screw.

Plaintiff reduces its dictionary definitions almost to the point of abstraction,[8] such that its definition for bolt is overly broad and ambiguous. For purposes of illustration, its definition of bolt is "a rod which fastens two or more objects together." Pl.'s Br., at 9. Yet, that definition encompasses screws as well; in simplest terms they, too, are rods that fasten things together. *See, e.g.*, American Heritage Dictionary of the English Language 1622 (3d ed. 1996) ("A metal pin... that can be driven as a fastener.").

Clearly, accepting a definition of bolt as broad as that urged by plaintiff would create conflict between 7318.15.20 and other provisions under subheading 7318.15. Subheading 7318.15 applies to both screws and bolts. Under plaintiff's urged definition of bolt, however, any rod-like object that fastens things together would be classified under 7318.15.20, including screws. In that case, the "[o]ther" provisions of 7318.15 — 7318.15.60 and 7318.15.80 — would be serve no function and be completely superfluous. And it is axiomatic in Customs law, and indeed all statutory construction exercises, that a court not interpret one provision of a statute as to render meaningless another. *See Dow Chem. Co. v. United States*, 10 CIT 550, 552-53, 647 F. Supp. 1574, 1578 (1986) (refusing to interpret a tariff provision so as to render superfluous or partially nullify other provisions). Thus, plaintiff's proposed definition of bolt must fail.

Plaintiff contends, nonetheless, that "the essence of" its formulation for the common and commercial meaning of bolt has been adopted by the court in prior cases. See Pl.'s Br., at 10. The majority of the cases cited by plaintiff are not persuasive in this case, however, because they do not elucidate the meaning of bolts vis a vis screws; instead, those cases discuss bolts in comparison with other types of merchandise.

For example, plaintiff cites *S.I. Stud*. Like the instant case, the merchandise at issue was fasteners imported from Japan. *See* 17 CIT at 661. Unlike this case, however, the court was faced with a choice, not between bolts and screws, but bolts and studs. Thus, the court did not have occasion to consider bolts, as relevant to this case, in relation to screws.[9]

It is notable, however, that in finding that the fasteners were studs,[10] the *S.I. Stud* court rejected the "broad" definition of bolt proffered by

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[7] Plaintiff also phrases its definition of bolt as a "rod or pin-shaped object with a head on one end and which is designed to fasten objects in place (or together)." Pl.'s Br., at 11.

[8] Interestingly, plaintiff eschews any mention of a nut, even though both of its definitions do so.

[9] Similarly, the court in *A.L. Liebman & Son, Inc. v. United States* chose between bolts and anchors, not bolts and screws. 65 Cust. Ct. 85 (1970).

[10] The court found that the fasteners were studs, in large measure, based on the difference in "shape or configuration" of the fasteners. *S.I. Stud*, 17 CIT at 664. The studs were threaded at both ends, had no head, and were used to fasten items together with nut at each end. *See id.* at 662. The Court observes that even the studs at issue in *S.I. Stud* would fall within plaintiff's proffered definition of bolt as a "rod which fastens two or more objects together".

plaintiff in that case. *See id.* at 664. And given the "overlap between" the definitions of bolt and stud in "general purpose dictionaries," the court "place[d] greater emphasis on . . . technical sources." *Id.* at 669. One of the technical sources relied on by that court was a publication of the American Society of Mechanical Engineers, one of the organizations responsible for ANSI/ASME Standard B18.2.1. *See id.* at 669-70.

Plaintiff's citation to *Atlas Copco N. Am., Inc. v. United States* is also inapt in that the court considered bolts in the context of merchandise other than screws. 17 CIT 1163, 837 F. Supp. 423 (1993). That case involved a unique item known as a Swellex bolt. Plaintiff argued that Swellex bolts should be classified under the provision for bolts, but Customs classified them instead as "articles of iron or steel." In analyzing whether the Swellex bolts were "bolts" or "other articles of iron or steel," one of the main issues facing the *Atlas Copco* court was whether, under the precursor to the HTSUS, the TSUS, a non-threaded object could be classified as a bolt. *See Atlas Copco*, 17 CIT at 1166, 837 F. Supp. at 425. The court's discussion regarding legislative intent and the characteristics of bolts is, for that reason, completely inapplicable to the controversy before the Court; heading 7318 of the HTSUS is divided into threaded and non-threaded articles, and the provisions for both screws and bolts are threaded articles. Thus, under the current provisions, a non-threaded fastener could never be classified as a bolt.

Finally, plaintiff cites Hafele to support its broad definition for bolt. Hafele is the most relevant of plaintiff's citations in that it involves the same tariff provisions at issue here; Customs classified the merchandise as a screw under 7318.15.80 and plaintiff argued the merchandise should instead be classified as a bolt under 7318.15.20.

The *Hafele* court determined that the merchandise in that case was bolt. The broad dictionary definitions cited for the term "bolt" in that case are not instructive here, however. In *Hafele*, the court first considered whether the merchandise was a screw. In that case, it was "undisputed that the subject merchandise does not accomplish its primary purpose [of fastening other objects together] upon having its head torqued." Hafele, 18 CIT at 1098, 870 F. Supp. at 355. The court stated that "the merchandise must mate with a cam in order to accomplish its purpose . . . the cam is then tightened and locked by torquing the cam, not by torquing the head of the merchandise." *Id.* In effect, the Court found that the fastener at issue was not a screw because it was not designed to be torqued by its head to fasten things together.

Notably, the court relied on ANSI/ASME Standard B18.2.1. (1981), the same standard invoked by defendant in this case, in its analysis. *See id.* Only after having determined that the merchandise was not a screw did the court find that it fit within broad dictionary definitions of bolt similar to those cited by plaintiff. In contrast, in this case, it is undisputed that the fasteners were designed to be, and in fact are installed by, torquing their heads. *See* Def.'s Stmt. Add'l Facts, at

¶32, ¶33; Pl.'s Resp. to Def.'s Facts, at ¶32, ¶33. Due to this factual distinction, plaintiff's reliance on the broad dictionary definitions of bolt is misplaced.

b. *Plaintiff's objections to Standard B18.2.1 are without merit*

Plaintiff argues that Standard B18.2.1 cannot be used to inform the common and commercial meaning of tariff terms, and in any event is not applicable to its fasteners. Plaintiff argues that (1) the Standard is a "technical" meaning that must be definite, uniform, and general throughout the trade, (2) Congress did not explicitly adopt the standard in the HTSUS, (3) the Standard is not applicable because it is a U.S. standard and the fasteners are manufactured in Japan, and that (4) with particular respect to the automotive industry, the Standard is outdated. Plaintiff's objections are without merit.

First, plaintiff asserts that ANSI/ASME Standard B18.2.1 is a technical standard that differs from the common and commercial meaning of bolt and screw. *See* Pl.'s Br., at 19-20. According to plaintiff, this "technical definition" is "equated with a proffered commercial designation" that defendant must demonstrate is definite, uniform, and general throughout the trade. Pl.'s Br., at 20. Plaintiff also argues that Congress did not include ANSI/ASME Standard B18.2.1 in the notes or otherwise refer to it in the HTSUS, and therefore that "the standard should be ignored for classification purposes." Pl.'s Br., at 20.

Plaintiff is wrong on both points. Standard B18.2.1 is not a commercial designation; the court has consulted standards promulgated by ANSI, ASME, and many other standard-making bodies in numerous cases to inform the common and commercial meaning of tariff terms. *See* introduction to Section B, *supra*. The court has done so even when such standards were not explicitly part of the HTSUS.

Plaintiff also "questions the applicability of ANSI/ASME B18.2.1 (1981) to the subject imported fasteners" because the fasteners were manufactured according to Japanese, not American, specifications. Pl.'s Br., at 22. Plaintiff is patently mistaken. First, the ANSI/ASME Standard B18.2.1 is a methodology for distinguishing between bolts and screws, not specifications for the length, diameter, size of head, etc., of particular bolts and screws. Therefore, that the subject fasteners were manufactured to fit into Japanese cars is irrelevant to the applicability of ANSI/ASME Standard B18.2.1. Second, under the HTSUS, goods are classified within the meaning of the tariff terms *as understood in the United States*, not the county of exportation. *See Hismoco (Am.) Co. v. United States*, 81 Cust. Ct. 32, 34 (1978) (assessing whether the merchandise at issue was within the common meaning of "'dried prunes' as that term is used in the commerce of the United States); *Buchanan Elec. Prods. Co. v. United States*, 65 Cust. Ct. 570, 577 (1970) (finding the merchandise was "tubes" as commonly known in the United States); *Ziel & Co. v. United States*, 53 Cust. Ct. 164, 166 (1964) (rejecting claim that kiwi fruit was within the com-

mon meaning of "berries" as the term is used in the United States); *Wing Coffee Co. v. United States*, 53 Cust. Ct. 60, 63 (1964) (finding that larm are not olives as commonly known in the United States). Thus, the fasteners at issue cannot be classified according to Japanese convention.[11]

Finally, plaintiff complains that, in relation to the automotive industry standards and techniques, ANSI/ASME B18.2.1 is outdated and ambiguous. According to plaintiff, "[t]he manufacturing process in various fields has . . . evolved to the point that, even when used with a nut, bolts are driven by the head." Pl.'s Br., at 24. In such cases, "the nuts are already welded into place and the bolts must be driven by their head in the assembly."[12] *Id*. In plaintiff's view, because some of the subject fasteners are used with nuts in this manner, ANSI/ASME B18.2.1 is inapplicable to the automotive industry.

Plaintiff is incorrect for a number of reasons. First, ANSI/ASME Standard B18.2.1 is reviewed by the American Society of Mechanical Engineers (ASME) every five years.[13] *See* Def.'s Br., at 18 and n.19. And, the Standard was approved by ANSI in December, 1996. See Def.'s Br., Vass. Dec., Ex. E (1999 Foreword to ASME B18.2.1). Importantly, according to Charles J. Wilson, Director of Engineering at the Industrial Fasteners Institute, General Motors, Ford Motor Company, Chrysler Corporation, and other automotive companies helped formulate ANSI/ASME B18.2.1 and have been and continue to be participants in the B18 Standards Committee. *See* Def.'s Reply Br., Wilson Decl., ¶4; see also Def.'s Br., Vass Decl., Ex. I (ASME Standards Committee B18). And, ASME membership includes both manufacturers and users. See Def.'s Br., Vass Decl., ¶16. These facts mitigate against plaintiff's claim that the standard is outdated with respect to the automotive industry, or not in accordance with its manufacturing processes. And at oral argument on June 6, 2000, plaintiff could not identify specific changes in manufacturing processes or the design of fasteners in the last thirty years to counter defendant's classification.

Second, plaintiff does not dispute that the subject fasteners are properly classified under Heading 7318. The articles contained within heading 7318 are "parts of general use."[14] Section XV, Note 2(a), HTSUS (1997). As such, they are not classified according to a particu-

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[11] Plaintiff also notes that "[t]he subject fasteners are designed in terms of 'metric' measurements (i.e., measured in millimeters), as opposed to English measurements." Pl.'s Br., at 2. This is irrelevant. First, 7318.15.80 is expressed in millimeters: "Having shanks or threads with a diameter of 6 mm or more." Moreover, ANSI/ASME Standard B18.2.1 is equally applicable to metric fasteners. *See* Def.'s Br., Vass Decl., Ex. B (*Metric Fastener Standards* (2d ed. 1983)).

[12] If the design and manner of use of screws and bolts has evolved to the point where they are indistinguishable from one another, the most appropriate forum to make this argument is before Congress, which has the authority to revise the HTSUS.

[13] "According to the bylaws of ASME, standards are reviewed every five years. Depending on the outcome of that review, the standard must be reaffirmed, meaning no changes are required, revised, or withdrawn (canceled) if there is evidence that the standard is not being used." Def.'s Br., Vass Decl., ¶16. Thus, although it appears that the Standard has not been revised since 1981, it has been reviewed several times since then.

[14] Parts of general use, such as the articles of heading 7318, are specifically exempted from classification under the chapter for vehicles. *See* Section XVII, Note 2(b), HTSUS (1997).

lar industry.[15] *Cf.* Item 8708.40.20 (applicable to gear boxes as known in the motor vehicle (designed for transport of persons) industry). Thus, contrary to plaintiff's position, ANSI/ASME Standard B18.2.1 is no less applicable because plaintiff's fasteners – parts of general use – are used in the automotive industry.[16]

Third, plaintiff admits that 7318.15 is neither an actual use nor a principal use provision. *See* Def.'s Stmt. Add'l Facts, ¶2, ¶3; Pl.'s Resp. to Def.'s Facts, ¶2, ¶3. And generally, use is not considered unless use is part of the definition of the classification or use is otherwise suggested. *See North Am. Processing*, 23 CIT at __, 56 F. Supp. 2d at 1180 (citing Ruth Sturm, Customs Law & Administration § 53.2 (Supp. 1995)). Thus, that the subject fasteners are ultimately used in the assembly of automobiles has no bearing on the common and commercial meaning of bolt and screws, nor does it vitiate ANSI/ASME Standard B18.2.1's applicability. *Cf. Carl Zeiss*, 195 F.3d at 1379 (refusing to narrow a provision for microscopes to only those used in research and industry because "a use limitation should not be read into an eo nomine provision unless the name itself inherently suggests a type of use"). And if Customs took into account how different fasteners of general use were actually used in different industries to determine whether they were bolts or screws, classification would be inconsistent and therefore counter to the principle underlying the tariff classification system. *See Henry Dickens Rowley v. United States*, 68 Cust. Ct. 117, 122 (1972) (calling "[u]niformity of tariff classification, an important tariff principle").

Moreover, although plaintiff's customers use the subject fasteners for assembly of the engine, suspension, and body of automobiles, the fasteners are not limited to use in those areas only. *See* Pl.'s Br., at 2; see also Pl.'s Br., Higuchi Decl., ¶12 (stating that the subject fasteners are used in the engine wire harness assembly, oil pump, oil pan assembly, clutch, accumulator body, regulator, servo body, exhaust pipe, fuel pipe, radiator, navigation (GPS) system, antilock brake system, windshield washer, radio speakers, rear brake, cruise control, brake master cylinder, suspension, shift lever, console, seats, doors, sunroof, and trunk lid). And "[s]ervice applications for the same fastener may vary." Def.'s Stmt. Add'l Facts, ¶11, Pl.'s Resp. to Def.'s

[15] In fact, in addition to the automotive industry, the American National Standards Committee B18 included representatives from the hardware, engine manufacturing, anti-friction bearing manufacturing, agricultural, metal cutting tool, hand tool, farm & industrial equipment, elevator, telephone, and electrical manufacturing industries, as well as the Navy, Army, Air Force and Department of Defense. *See* Pl.'s Br., Seirig Decl., Ex. D (roster of committee personnel).

[16] Thus, the testimony of Ali A. Seirig, Professor in the Department of Mechanical Engineering of the University of Wisconsin-Madison, that the Standard "bears little relation to how those terms [bolt and screw] are used in applications in various industries, including the automotive and aerospace industries" misses its mark. Pl.'s Br., Seirig Decl., ¶9. Moreover, Professor Seirig does not express a belief that the subject fasteners are bolts. He only states that, in his view, "the main distinguishing characteristic between a bolt and a screw would be the fastener's ability to bore a hole, or create mating threads in a material. From my review of the products in Exhibit A, none appear to meet this basic requirement of a screw." *Id.* at ¶11.

It is worth noting that, with respect to the ability to bore a hole, that Explanatory Note 73.18(A) distinguishes between "[b]olts and screws for metal" and "[s]crews for wood," which would be classified under 7318.12. According to the Note, the former "are rarely pointed." The latter, however, "differ from bolts and screws for metal in that they are tapered and pointed, and they have a steeper cutting thread since they have to bite their own way into the material."

Facts, ¶11. The subject fasteners are not limited to use in automobiles either, but can be used in a variety of other industries. *See* Pl.'s Br., at 1 (stating that the subject fasteners may also be used in the manufacture of motorcycles); Tr. of Oral Argument of 10/27/99, at 8-9 (representation by counsel for plaintiff that the subject fasteners can be used in other industries).

In conclusion, plaintiff's objections to ANSI/ASME Standard B18.2.1 are without merit. As stated, the Standard is the common and commercial meaning of bolt and screw as understood by the fastener industry in the United States.

C. *The Subject Fasteners are Screws*

The Court has determined that under ANSI/ASME Standard B18.2.1, "[a] screw is an externally threaded fastener capable of being inserted into holes in assembled parts, of mating with a preformed internal thread or forming its own thread, and of being tightened or released by torquing the head." Def.'s Br., Ex. A, ¶2.2. Plaintiff does not dispute that "[t]he Samples, Drawings, and/or Manuals provided by Rocknel indicate that the imported fasteners were designed to be installed in holes of assembled parts by turning the heads of the fasteners to mate with preformed internal threads or form their own threads, and by turning the heads to tighten or release."[17] Def.'s Stmt. Add'l Facts, ¶32; Pl.'s Resp. to Def.'s Facts, ¶32.

Further, under ANSI/ASME Standard B18.2.1,

> [a] bolt is designed for assembly with a nut. A screw has features in its design which makes [sic] it capable of being used in a tapped or other preformed hole in the work. Because of basic design, it is possible to use certain types of screws in combination with a nut. Any externally threaded fastener which has a majority of the design characteristics which assist its proper use in a tapped or other preformed hole is a screw, regardless of how it is used in service application.

Def.'s Br., Ex. A, ¶3 (Explanatory Data). In characterizing the subject fasteners as screws, defendant found that the fasteners met at least five of the Standard's nine supplementary design criteria for screws. Plaintiff has not submitted evidence to dispute this finding. Nor has plaintiff argued in sufficient detail that under ANSI/ASME Standard B18.2.1, the subject fasteners are bolts. Accordingly, the subject fasteners are screws.

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[17] Plaintiff "[d]enies that nuts are equated with preformed internal threads" but "[a]dmits in other respects." Pl.'s Resp. to Def.'s Facts, ¶32.

IV.

CONCLUSION

For the foregoing reasons, the Court grants defendant's motion for summary judgment and denies plaintiff's motion for summary judgment. A separate Order will be entered accordingly.

RICHARD W. GOLDBERG
Judge

Dated: August 29, 2000
New York, New York.

ROCKNEL FASTENER, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Court No. 97-10-01702

JUDGEMENT ORDER

Upon consideration of plaintiff's motion for summary judgement, defendants's cross-motion for summary judgement, plaintiff's memorandum of law in support of its motion for summary judgement, defendant's memorandum in support of its cross-motion for summary judgement and in opposition to plaintiff's motion for summary judgement, plaintiff's opposition to defendant's cross-motion for summary judgement and reply to defendant's opposition to plaintiff's motion for summary judgement, and defendant's reply to plaintiff's opposition to defendant's cross-motion for summary judgement; upon all other papers and proceedings had herein; and upon due deliberation, it is hereby

ORDERED that defendant shall submit a draft order proposing the reliquidation of Samples 2, 9, and 59 in accordance with the parties' discussion at the June 6, 2000 hearing; and it is further

ORDERED that the classification of the remaining subject merchandise by the United States Customs Service under subheading 7318.50.80 of the Harmonized Tariff Schedule of the United States is sustained. Judgement is hereby entered for those items for defendant.

RICHARD W. GOLDBERG
Judge

Dated: August 29, 2000
New York, New York.

NOTICE OF ENTRY AND SERVICE

This is a notice that an order or judgement was entered in the docket of this action, and was served upon the parties ont he date shown below.

Service was made by depositing a copy of this order or judgement, together with any papers required by USCIT Rule 79(c), in a securely closed endorsed penalty cover in a United States mail recaptacle at One Federal Plaza, New York, New York 10007 and addressed to the attorney or record for each party at the address on the official docket in this action, except that service upon the United States was made by personally delivering a copy to the Attorney-In-Charge, International Trade Field Office, Civil Division, United States Department of Justice, 26 Federal Plaza, New York, New York 10278 or to a clercial employee designated, by the Attorney-In-Charge in a writing field with the clerk of the court.

LEO M. GORDON
Clerk of the Court

By STEVE TAROY
Deputy Clerk

Date: August 29, 2000

(Slip Op. 00-113)

TAIWAN SEMICONDUCTOR INDUSTRY ASSOCIATION, ET AL., PLAINTIFFS, AND MOTOROLA, INC., PLAINTIFF-INTERVENOR, V. UNITED STATES, DEFENDANT, AND MICRON TECHNOLOGY, INC., DEFENDANT-INTERVENOR

Court No. 98-05-01460

[The International Trade Commission's second remand determination is affirmed.]

(Decided: August 29, 2000)

Before: POGUE, *Judge*

White & Case, LLP (*Christopher F. Corr*, *Richard G. King*, and *Lyle Vander Schaaf*) for Plaintiffs.

Lyn M. Schlitt, General Counsel; *James A. Toupin*, Deputy General Counsel; *Michael Diehl*, Office of the General Counsel, U.S. International Trade Commission, for Defendant.

Hale and Dorr LLP (*Gilbert B. Kaplan*, *Michael D. Esch*, *Paul W. Jameson*, and

Cris R. Revaz) for Defendant-Intervenor.

OPINION

POGUE, *Judge*: Before the Court is the U.S. International Trade Commission's ("Commission") second remand determination concerning static random access memory semiconductors ("SRAMs") from Taiwan. In its first determination, the Commission concluded that the U.S. SRAM industry was materially injured by reason of imports of SRAMs from Taiwan that were sold at less than fair value ("LTFV"). *See Static Random Access Memory Semiconductors from the Republic of Korea and Taiwan*, Inv. Nos. 731-TA-761 & 762 (Final)(List 2, Doc. 395)(Apr. 9, 1998) at 37-38 ("Final Determination").[1] The Court could not sustain the Commission's affirmative injury determination, however, because the Commission did not adequately explain how it avoided attributing to the subject imports the harmful effects from other known sources of injury. *See Taiwan Semiconductor Indus. Ass'n v. United States*, 23 CIT ___, ___, 59 F. Supp. 2d 1324, 1336 (1999)("*Taiwan I*"). Therefore, we remanded the Commission's affirmative determination for reconsideration consistent with the Court's opinion. *See id.*

On remand, the Commission again determined that the domestic industry was materially injured by reason of SRAMs from Taiwan. See Commission's Determ. on Remand (List 2, Doc. 406)(Aug. 30, 1999) at 1 ("First Remand Determination"). Absent greater explanation, however, the Court again could not sustain the Commission's remand determination. *See Taiwan Semiconductor Indus. Ass'n. v. United States*, 24 CIT ___, ___ , slip op. 00-37 at 55 (Apr. 11, 2000) ("*Taiwan II*").[2] Therefore, we remanded the Commission's first remand determination for reconsideration consistent with the Court's opinion. *See id.*

In its second remand determination, the Commission now determines that, pursuant to section 735(b) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673d(b)(1994), "an industry in the United States is not materially injured or threatened with material injury by reason of imports of [SRAMs] from Taiwan that have been found by the Department of Commerce to be sold in the United States at [LTFV]." Commission's Determ. on Remand (List 2, Doc. 411)(June 23, 2000) at 1 ("Second Remand Determination").

In reviewing the Commission's second remand determination, we are presented with the following issues: (1) whether the Commission conducted its second remand in accordance with this Court's remand order in *Taiwan II* and otherwise in accordance with law; and (2) whether the Commission's negative determination on remand is supported by substantial evidence.

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[1] List 1 consists of the documents within the public portion of the record made before the Commission. List 2 consists of the documents within the confidential portion of the same record.

[2] Familiarity with the Court's previous decisions in *Taiwan I* and *Taiwan II* is presumed.

STANDARD OF REVIEW

The Court must sustain the Commission's second remand determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. *Did the Commission conduct its second remand proceedings in accordance with this Court's remand order in Taiwan II and otherwise in accordance with law?*

The statute directs the Commission to "make a final determination of whether . . . an industry in the United States . . . is materially injured, or . . . threatened with material injury . . . by reason of [LTFV] imports . . . ." 19 U.S.C. § 1673d(b). The six commissioners comprising the Commission vote to make this determination. *See Taiwan II*, 24 CIT at ___, slip op. 00-37 at 4. As more fully described in *Taiwan II*, the details surrounding the Commission's voting record in its investigation of SRAMs from Taiwan are rather unique. *See id.* at ___, slip op. 00-37 at 4-6. Due to vacancies and a recusal, only two commissioners actually voted in the original determination. Commissioner Bragg found that the U.S. industry was materially injured by reason of LTFV imports of SRAMs from Taiwan, with Commissioner Miller dissenting.[3] *See* Final Determination at 33 n.168. Accordingly, Commissioner Bragg's decision constituted an affirmative determination of the Commission pursuant to 19 U.S.C. § 1677(11).[4]

"By the time of the remand, three new members had been appointed to the Commission: Commissioner Askey, Commissioner Koplan, and Commissioner Hillman." *Taiwan II*, 24 CIT at ___, slip op. 00-37 at 5. Nevertheless, only Commissioner Bragg prepared written views on remand. See First Remand Determination at 1 n.1. "The Commission . . . submit[ted] [Commissioner] Bragg's remand views to the Court . . . as its 'Views on Remand[.]'" *Id.*

In *Taiwan II*, Plaintiffs argued that the Commission's first remand determination was unlawful because it only constituted the views of Commissioner Bragg. *See* 24 CIT at ___, slip op. 00-37 at 6. Plaintiffs maintained that all eligible commissioners should have participated in the remand determination, because the applicable statute, case law, and this Court's remand order in *Taiwan I* all compelled an institutional response. *See id.*

Upon reviewing 19 U.S.C. § 1516a(c)(3), the relevant case law, and our own remand order in *Taiwan I*, we agreed that all eligible commissioners should have participated meaningfully in the remand. *See*

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[3] From the date of the original determination to the present, several commissioners have served as Chairman and Vice Chairman of the Commission. For the sake of simplicity, we refer to all commissioners by the title "Commissioner."

[4] That provision states, "If the Commissioners voting on [an injury] determination . . . are evenly divided as to whether the determination should be affirmative or negative, the Commission shall be deemed to have made an affirmative determination." 19 U.S.C. § 1677(11).

id. at ___, slip op. 00-37 at 9. That is, the commissioners should have adequately considered the record evidence and the decision's merits before submitting the remand views of Commissioner Bragg as an institutional response of the Commission. *See id.* at ___, slip op. 00-37 at 9-16. Because there was no clear evidence demonstrating that the full Commission had not meaningfully participated in the remand, however, the Court presumed that the commissioners properly discharged their official duties. *See id.*[5]

Nevertheless, although Plaintiffs' arguments did not overcome the presumption of regularity supporting the acts of agency officials, *see id.* at ___, slip op. 00-37 at 11, 15-16, the Court noted, "[B]ecause we are remanding the decision for the reasons explained below, Plaintiffs will, in any event, be afforded the full Commission's reconsideration of the merits of the injury determination[,]" *id.* at ___, slip op. 00-37 at 16-17.

It is now clear, however, that the new commissioners did not meaningfully participate in the first remand determination. In a motion for extension of time, Defendant stated that, in the first remand proceeding, the new "commissioners did not undertake to themselves reach independent determinations based on a review of the substantive record." Consent Mot. of Def. for Extension of Time to Resp. to Ct.'s Remand Order (Apr. 21, 2000) at 2; *see also* Second Remand Determination at 2-3.

In the second remand determination, "all participating [c]ommissioners engaged in a substantive review of the record." Second Remand Determination at 3. Commissioners Hillman, Koplan, and Okun adopted,[6] with some elaboration, the negative material injury and threat determinations made by Commissioner Miller in her dissent issued with the original final determination.[7] *See id.* Commissioner Miller reaffirmed her original views offered in her dissent. *See id.* Commissioner Bragg maintained her finding that the domestic industry was materially injured by reason of the Taiwanese subject imports and dissented. *See id.* n.8. Therefore, in its second remand determination, the Commission determined, by a four to one margin, that the domestic industry was not materially injured or threatened with material injury by the Taiwanese imports.

Defendant-Intervenor, Micron Technology, Inc. ("Micron"), now argues that the Commission's second remand determination "consti-

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[5] "The presumption of regularity supporting the acts of agency officials mandates that, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'" *Taiwan II*, 24 CIT at ___, slip op. 00-37 at 9-10 (quoting *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926)); *see also United States v. Morgan*, 313 U.S. 409, 422 (1941). "[F]ederal courts have consistently recognized that challengers must satisfy a high burden in order to rebut the presumption that agency officials have adequately considered the issues in making a final decision, including their reading and understanding of the record evidence." *Id.* at ___, slip op. 00-37 at 10 (citations omitted).

[6] As long as they meaningfully participate in the determination, "it is appropriate for commissioners to adopt one another's views." *Taiwan II*, 24 CIT at ___, slip op. 00-37 at 12 (citation omitted). As noted above, the Commission majority has indicated that, in conducting the second remand determination, the commissioners engaged in a substantive review of the record. Accordingly, it was appropriate for the new commissioners to adopt Commissioner Miller's views.

[7] By the date of the second remand, new Commissioner Okun had begun serving her term; Commissioner Crawford's term had expired; and Commissioner Askey had recused herself. *See* Second Remand Determination at 2-3.

tuted an improper de novo review of its Final Determination and thereby exceeded the parameters of the Court's second remand instructions in *Taiwan II*, violated the law of the case, and violated Micron's right to due process." Cmts. of Micron in Opp'n to Commission's Second Remand Determination ("Micron Cmts.") at 4-5.

According to Micron, in *Taiwan II*, the Court sustained the First Remand Determination in nearly all respects, only remanding "two fairly narrowly-drawn issues" for further explanation. *See id.* at 5-7. Micron is correct that the Court indicated that it could not sustain two findings absent greater explanation. We stated that we could not, without more, "conclude that the record as a whole support[ed] the Commission's apparent finding on remand that non-subject imports were not significantly competitive in the market segment in which domestic and Taiwanese SRAMs were concentrated." *Taiwan II*, 24 CIT at ___, slip op. 00-37 at 43. We also held that, "inasmuch as the Commission's determination that the subject imports had significant price depressing effects relie[d] on its market segment finding, as explained, the Court [could not] sustain this determination." *Id.* at ___, slip op. 00-37 at 46. In addition, we could not sustain the Commission's conclusion "that the instances of lost revenues for product 5 had a significant negative impact on the domestic industry's operating income" absent an explanation of how it was reasonable to rely on certain allegations in confirming lost revenues. *Id.* at ___, slip op. 00-37 at 53.

Micron is incorrect, however, insofar as it asserts that the Court's remand order in *Taiwan II* was necessarily limited to these two issues. Rather, in expressing our inability to sustain the Commission's affirmative injury determination absent greater explanation of the market segment and lost revenue findings, we invited the Commission to reconsider the merits of its determination. *See id.* at ___, slip op. 00-37 at 55 ("Accordingly, the Commission's determination is remanded for *reconsideration* consistent with this Court's opinion.")(emphasis added). "[The] Court was free, within reasonable limits, to set the parameters of the remand" to the Commission. *Trent Tube Div. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 814 (Fed. Cir. 1992). Moreover, "[t]he purpose of a remand generally is to require the agency to explain its determination or where appropriate, correct its determination." *Trent Tube Div. v. United States*, 14 CIT 780, 781 n.1, 752 F. Supp. 468, 470 n.1 (1990), *aff'd*, 975 F.2d 807 (Fed. Cir. 1992). Based on the remand order in *Taiwan II*, the Commission had discretion to reconsider the merits of the injury determination.

Of much greater importance, however, is the fact that, contrary to our presumption in *Taiwan II*, all eligible commissioners did *not* meaningfully participate in the Commission's first remand determination. *See supra* p. 7. Therefore, in conducting the second remand determination, the eligible commissioners had an obligation to review the record evidence and make informed conclusions regarding the determination's merits in accordance with 19 U.S.C. § 1516a(c)(3),

precedent, and the Court's remand orders. *See Taiwan II*, 24 CIT at ___, slip op. 00-37 at 7-9. As we stated in *Taiwan II*, despite application of the presumption of regularity, Plaintiffs would in any event "be afforded the full Commission's reconsideration of the merits of the injury determination[,]" since we were remanding the first remand determination. *Id.* at ___, slip op. 00-37 at 16-17. Therefore, contrary to Micron's assertion, the new commissioners had a duty to evaluate the merits of the injury determination de novo, reviewing the statutory factors prescribed in 19 U.S.C. § 1677(7)(B), (C), (F), rather than limiting themselves to the two narrow findings that required greater explanation.

In addition, Micron argues that, by "failing to respect the Court's disposition of the issues addressed in *Taiwan I* and *Taiwan II*, the Commission subverted the purpose of judicial review and violated the law of the case." Micron Cmts. at 13. "The law of the case doctrine holds that 'a decision on an issue of law made at one stage of a case becomes binding precedent to be followed in successive stages of the same litigation.'" *Chung Ling Co., Ltd. v. United States*, 17 CIT 829, 836, 829 F. Supp. 1353, 1360 (1993) (quoting 1B James W. Moore et al., *Moore's Federal Practice* ¶ 0.404[1] (2d ed. 1992)). Micron argues that, because the Court sustained many of the findings in the original and first remand determinations as supported by substantial evidence in *Taiwan II*, the Commission cannot now reach the opposite conclusions in its second remand determination. *See* Micron Cmts. at 14.

Micron's "law of the case" argument is inapposite to the present situation. In *Taiwan II*, we did not hold that certain of the conclusions in the first determination were correct as a matter of law. Rather, we held that certain conclusions were supported by substantial evidence and were otherwise in accord with law. Such a holding "is not necessarily inconsistent with a holding that the opposite conclusion[s] [were] also supported by substantial evidence and otherwise in accord with law." *Trent Tube*, 975 F.2d at 814. "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). Therefore, the "law of the case" doctrine does not apply to this case. *See Trent Tube*, 975 F.2d at 814.

Finally, Micron submits that, by conducting a de novo review of the full merits of the injury determination in the second remand, the Commission deprived Micron of due process. *See* Micron Cmts. at 14-15. "If the Commission considered it necessary to reconsider all issues in the proceeding," Micron argues, "it should have: (1) provided an opportunity for the parties to fully brief all issues that the Commission would be addressing in its [second remand determination] and (2) held a hearing before the full Commission to allow parties to provide their views on the issues raised in a de novo review." *Id.* at 14-15.

In the administrative proceedings leading up to the original deter-

mination, however, Micron already had the opportunity to submit briefs to the Commission regarding whether SRAMs from Taiwan had materially injured the domestic industry. As these documents were included in the administrative record, the new commissioners surely had access to Micron's views of the case, and the Court presumes the Commission considered them in conducting its second remand determination. *Cf. Taiwan II*, 24 CIT at ___, slip op. 00-37 at 43 ("The Court presumes the Commission considered all of the evidence in the record.")(citation omitted). Moreover, it was not necessary for the Commission to hold a new hearing regarding the merits of the injury determination; the new commissioners had the benefit of the record transcript of the original hearing concerning the merits, see Feb. 18, 1998, Hearing Tr. (List 1, Doc. 252), and the Court presumes they considered this record evidence. *See Grupo Industrial Camesa v. United States*, 18 CIT 461, 464, 853 F. Supp. 440, 443 (1994)("'[A] member of an administrative agency who did not hear oral argument may nevertheless participate in the decision where he has the benefit of the record before him.'")(quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 802 (D.C. Cir. 1965)), *aff'd*, 85 F.3d 1577 (Fed. Cir. 1996). Therefore, the Commission did not violate on remand whatever due process rights Micron may have.

For the foregoing reasons, the Court concludes that the Commission conducted its second remand proceedings in accordance with the remand order in *Taiwan II* and in accordance with law.

II. *Is the Commission's negative injury determination on remand supported by substantial evidence and otherwise in accordance with law?*

A. *Present Material Injury*

In its second remand determination, the Commission concludes that the U.S. SRAM industry was not materially injured by reason of the Taiwanese imports. *See* Second Remand Determination at 1. "The term 'material injury' means harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A). "In examining 'whether [the subject] imports have caused material injury to a domestic industry,' the Commission is required under 19 U.S.C. § 1677(7)(B) to consider three factors: (1) the volume of the subject imports; (2) the effect of the subject imports on prices of domestic like products; and (3) the impact of the subject imports on domestic pro-

ducers of like products."[8] [9] *Taiwan II*, 24 CIT at ___, slip op. 00-37 at 18-19 (quoting *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 719 (Fed. Cir. 1997)). "Thus, after assessing whether the volume, price effects, and impact of the subject imports on the domestic industry are significant, the statutory 'by reason of' language implicitly requires the Commission to 'determine whether these factors as a whole indicate that the [subject] imports themselves made a material contribution to the injury.'"[10] *Taiwan I*, 23 CIT at ___, slip op. 00-37 at 21 (quoting *Gerald Metals, Inc. v. United States*, 22 CIT ___, ___, 27 F. Supp. 2d 1351, 1355 (1998)); *see also* 19 U.S.C. § 1673d(b)(1). Accordingly, "the Commission must examine other factors to ensure that it is not attributing injury from other sources to the subject imports." Statement of Administrative Action, H.R. Doc. No. 316, 103rd Cong., 2nd Sess. (1994), reprinted in Uruguay Round Agreements Act, Legislative History, Vol. VI, at 851-52.[11]

1. *Volume*

The statute directs the Commission to determine "whether the volume of [the subject imports], or any increase in that volume, either in absolute terms or relative to production or consumption in the

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[8] In addition, the Commission "may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports." 19 U.S.C. § 1677(7)(B)(ii).

[9] "The Commission evaluates the volume and price effects of the subject imports and their consequent impact on the domestic industry by applying the standards set forth in 19 U.S.C. § 1677(7)(C)." *Taiwan II*, 24 CIT at ___, slip op. 00-37 at 19 (citations omitted). The relevant portions state:

> (i) Volume
>
> In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.
>
> (ii) Price
>
> In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether–
>
> (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and
>
> (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.
>
> (iii) Impact on affected domestic industry
>
> In examining the impact required to be considered under subparagraph (B)(i)(III), the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to–
>
> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
>
> (II) factors affecting domestic prices,
>
> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,
>
> (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
>
> (V) in a proceeding under [19 U.S.C. §§ 1673-1673h], the magnitude of the margin of dumping.
>
> The Commission shall evaluate all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry.
>
> 19 U.S.C. § 1677(7)(C).

[10] The presence or absence of any factor is not necessarily dispositive to a finding of material injury. *See* 19 U.S.C. § 1677(7)(E)(ii). The Commission has discretion to weigh the significance of each factor in light of the circumstances. *See Iwatsu Elec. Co., Ltd. v. United States*, 15 CIT 44, 49, 758 F. Supp. 1506, 1510-11 (1991).

[11] The "by reason of" causation standard of 19 U.S.C. § 1673d(b) is more thoroughly set out in *Taiwan I*, 23 CIT at ___, 59 F. Supp. 2d at 1326-31, and *Taiwan II*, 24 CIT at ___, slip op. 00-37 at 17-23.

United States, is significant." 19 U.S.C. § 1677(7)(C)(i).

In the second remand determination, the Commission majority adopted Commissioner Miller's dissenting views to the original affirmative determination. *See* Second Determination at 4. The Commission stated,

> [I]f considered apart from the other factors we are required to consider, the absolute increase in the volume of the subject imports is significant. When evaluated in the context of the conditions of competition, however, the volume of subject imports, and increase in volume, are not sufficient to demonstrate that the subject imports themselves made a material contribution to any injury experienced by the domestic industry.

Id.

In its second remand determination, the Commission did not specify which conditions of competition influenced its analysis. Nevertheless, Commissioner Miller elaborated on the context of the conditions of competition in her original statement of her views. Miller noted that, during the period of investigation ("POI"), "U.S. apparent consumption of SRAMs increased substantially . . . ." First Determination at 39 (Comm'r Miller, dissenting). "In the context of this growing market," Miller continued, "U.S. SRAM producers lost considerable market share to imported SRAMs." *Id.* at 40. Based on the record Miller concluded, however, that the domestic industry lost market share "overwhelmingly to non-subject imports, rather than to subject imports from Taiwan." *Id.* Substantial evidence supports these findings.[12] *See* Staff Report (List 2, Doc. 34) at IV-9, Table IV-4 ("Staff Report"). Because there was "little gain in market share attributable to [the] subject imports[,]" Miller concluded that the increase in Taiwanese imports was not significant in relative terms. Final Determination at 40 (Comm'r Miller, dissenting).

Section 1677(7)(C)(i) affords the Commission the discretion "to analyze the volume of imports in either an absolute or relative sense depending upon what is appropriate under the circumstances." *USX Corp. v. United States*, 12 CIT 844, 848, 698 F. Supp. 234, 238 (1988). In *Taiwan I*, the Court held that substantial evidence supported the conclusion that the subject imports' absolute increase over the POI was significant. *See* 23 CIT at ___, 59 F. Supp. 2d at 1331. Nevertheless, given the substantial record evidence indicating that U.S. consumption also increased substantially, see Staff Report at IV-7, Table IV-3, and that non-subject imports greatly exceeded the Taiwanese SRAMs in terms of both absolute and relative increases in volume, *see id.* at IV-7, Table IV-3, and at IV-9, Table IV-4, it was reasonable for the Commission to evaluate the significance of the subject imports in

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[12] Over the POI, the Taiwanese imports' market share increased by just over 2%, while the non-subject imports gained just under 15% of the U.S. SRAM market. *See* Staff Report at IV-9, Table IV-4. Moreover, the non-subject imports held a much greater share of the U.S. market throughout the POI. *See id.*

relative terms. Because substantial evidence supports the conclusion that the volume of the subject imports was not significant relative to U.S. consumption, it was reasonable for the Commission to conclude in its second remand determination that the volume of the subject imports lacked significance overall.

In rebuttal, Micron argues, "Nowhere does the statute allow the Commission to negate the significance of import volume based on conditions of competition. The statute requires the significance of import volume be assessed solely in terms of increases considered on an absolute or relative basis." Micron Cmts. at 18. Micron is incorrect. First, the conditions of competition that the Commission largely referred to were the substantial increase in U.S. apparent consumption and the much greater market share held by the non-subject imports. *See* Final Determination at 39-40. Section 1677(7)(C)(i) clearly allows the Commission to take such factors into account in determining whether the volume of subject imports is significant relative to U.S. consumption. *See Taiwan I*, 23 CIT at ___, 59 F. Supp. 2d at 1332 n.12. Furthermore, the Commission may consider the broader conditions of competition affecting the domestic industry in evaluating the significance of the volume of subject imports. *See Angus Chemical Co. v. United States*, 20 CIT 1255, 1266, 944 F. Supp. 943, 952-53 (1996)("The Commission evaluates import volume 'in light of the 'conditions of trade, competition, and development regarding the industry concerned.'")(quoting *General Motors Corp. v. United States*, 17 CIT 697, 711, 827 F. Supp. 774, 787 (1993)), *aff'd*, 140 F.3d 1478 (Fed. Cir. 1998); *see also* S. Rep. No. 96-249, 96th Cong., 1st Sess. at 88 ("The significance of the various factors affecting an industry will depend upon the facts of each particular case.").

Therefore, substantial evidence supports the Commission's conclusion on second remand that the subject imports' volume was not significant.

2. *Price Effects*

The statute provides that, in evaluating the effect of the subject imports on domestic prices,

> [T]he Commission shall consider whether—(I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

19 U.S.C. § 1677(7)(C)(ii).

In its second remand determination, the Commission majority adopted and elaborated upon Commissioner Miller's discussion of price effects from her dissenting views to the original affirmative determination. *See* Second Remand Determination at 4. The Commission

found that "substantial evidence support[ed] the conclusion that price underselling by the subject imports was significant." Second Remand Determination at 4 n.9. Nevertheless, the Commission concluded that the Taiwanese imports did not have significant price depressing or suppressing effects. *See id.; see also BIC Corp. v. United States*, 21 CIT 448, 458, 964 F. Supp. 391, 401 (1997)("Evidence of underselling alone is legally insufficient to support an affirmative injury determination.").

The Commission collected price information for six SRAM products, designating them products 1 through 6. The Commission majority noted that domestic prices for SRAM products 1 through 6 generally "increased substantially during 1994 and through the third quarter of 1995[;] [p]rices then fell substantially beginning in the last quarter of 1995 and throughout 1996, before leveling off somewhat in 1997." Second Remand Determination at 4. The record evidence reasonably reflects these domestic price trends. See Staff Report, Tables V-1 to V-6, at V-6 to V-16. The Commission concluded, however, that subject imports did not contribute significantly to the price trends. *See* Second Remand Determination at 4.

In so finding, the Commission emphasized what it characterized as the "strong evidence of a lack of correlation and causative effect between the subject imports and domestic prices." *Id.* at 5. The Commission stated,

> With respect to products 3 and 5, which made up a greater share of the subject imports and of the domestic product than the rest of the identified products, the subject imports consistently undersold the domestic product by substantial margins during the time that domestic prices rose, yet mostly oversold the domestic product in 1996 and 1997 when prices fell.

Id.; *see also* Final Determination at 41-42 (Comm'r Miller, dissenting views). Substantial record evidence supports these conclusions.[13] *See* Staff Report at IV-7, Table IV-3, and at V-6 to V-16, Tables V-1 to V-6.

Micron notes that in *Taiwan II* the Court held that substantial evidence supported the conclusion that Taiwanese products 3 and 5 had price depressing effects. *See* Micron Cmts. at 21 (citing *Taiwan II*, 24 CIT at ___, slip op. 00-37 at 32-34). Nevertheless, the possibility of drawing two inconsistent conclusions does not prevent the Commission's findings in its second remand determination from being supported by substantial evidence. *See Consolo*, 383 U.S. at 620. Based on the evidence indicating mixed patterns of overselling and

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[13] Combined, Taiwanese products 3 and 5 accounted for over 50% of the Taiwanese SRAM imports in 1996 and over 67% in 1997. *See* Staff Report at IV-7, Table IV-3, at IV-9, at V-9 to V-10, Table V-3, and at V-13 to V-14, Table V-5. Meanwhile, products 3 and 5 accounted for just less than 40% of U.S. shipments in 1996 and over 60% of U.S. shipments in 1997. *See id.*

Taiwanese product 3 oversold the domestic product 3 in seven months of 1996 and in ten months of 1997. *See id.* at V-10, Table V-3. Taiwanese product 5 oversold the domestic product 5 in seven months of 1996 and in eight months of 1997. *See id.* at V-14, Table V-5.

underselling by Taiwanese products 3 and 5 during the period in which domestic prices were consistently declining, the Commission's conclusion that Taiwanese products 3 and 5 did not significantly affect domestic prices is reasonable.

The Commission majority next addressed products 1 and 2. First, the Commission noted that these products "accounted for a small share of shipments of domestic and subject import products . . . ." Second Remand Determination at 5. The Commission also pointed out that products 1 and 2 "were relatively new products during the period of investigation, with significant volumes beginning in the fourth quarter of 1995 for product 1 and the first quarter of 1997 for product 2." *Id.* Substantial evidence supports these conclusions.[14] *See* Staff Report at IV-7, Table IV-3, and at V-6 to V-8, Tables V-1 and V-2. Moreover, the record indicates that "SRAMs begin their life cycle as a value-added product but are quickly transformed into a commodity product . . . [;] [a]s a result, SRAM prices historically show a pattern of steep price declines as the products move along market and production life cycles." Staff Report at I-20.

Based on this information, the Commission concluded that the subject imports did not have significant price depressing effects on domestic products 1 and 2. Regarding product 1, the Commission first noted that, from January 1996 through January 1997, the "price of domestic product 1 fell at roughly the same rate as prices of domestic products 3 and 5." Second Remand Determination at 5-6. The record supports this finding. *See* Staff Report at V-7, Table V-1, at V-10, Table V-3, and at V-14, Table V-5. Yet, the Commission claimed, because product 1 was a newer product, "prices for product 1 would be expected to fall more rapidly in 1996 than prices for products 3 and 5." Second Remand Determination at 6. That the "prices for domestic product 1 fell less than would be expected based on the price trends for [domestic] products 3 and 5[,]" the Commission reasoned, suggested that the subject imports did not significantly affect domestic prices for product 1. *Id.*

The Commission's conclusions regarding product 1 are reasonable. The record indicates that the most dramatic domestic price declines for all products generally occurred in 1996. *See* Staff Report at V-6 to V-16, Tables V-1 to V-6. Based on the evidence that domestic prices for products 1, 3, and 5 fell at approximately the same rate during this year even though Taiwanese products 3 and 5 were both overselling and underselling while Taiwanese product 1 was consistently underselling, the Commission majority reasonably concluded that there was a lack of correlation between the pricing of the subject imports and domestic prices for product 1.

Regarding product 2, the Commission stated, "[P]rices of domestic product 2 fluctuated upward from January through June of 1997, the

[14] Combined, Taiwanese products 1 and 2 accounted for slightly over 20% of Taiwanese imports in 1996 and roughly 25% of Taiwanese imports in 1997. *See* Staff Report at IV-7, Table IV-3, and at V-6 to V-8, Tables V-1 and V-2. Meanwhile, products 1 and 2 accounted for less than 5% of U.S. shipments in 1996 and less than 10% of U.S. shipments in 1997. *See id.*

only year for which we have comparable data, despite [very high margins of underselling by the Taiwanese imports in product 2]." Second Remand Determination at 6. Substantial record evidence supports this finding. *See* Staff Report at V-8, Table V-2. From this evidence the Commission concluded, "Thus, the limited data for product 2 also demonstrate[d] an absence of a significant price depressing or suppressing effect by subject imports." Second Remand Determination at 6. The record reasonably supports the Commission's conclusion.

Micron challenges the Commission majority's conclusions as to products 1 and 2, pointing to the Court's holding in *Taiwan II* that substantial evidence supported the conclusions that the significant underselling of newer Taiwanese products 1 and 2 had price depressing effects. *See* Micron Cmts. at 22. Again, however, the possibility of drawing two inconsistent conclusions does not prevent the Commission's finding from being supported by substantial evidence. *See Consolo*, 383 U.S. at 620. The record as a whole reasonably supports the Commission majority's conclusion that the subject imports did not have significant price depressing or suppressing effects on domestic products 1 and 2.

Based on the evidence of a lack of correlation between the prices of the subject imports and the domestic products, the Commission majority reasonably concluded that the domestic price declines were not "attributable in significant part to the subject imports."[15] Second Remand Determination at 6. In addition, the Commission concluded that the domestic price trends, "including price increases in 1994 and much of 1995, and price declines starting in the fourth quarter of 1995, [were] attributable to market forces other than the subject imports." *Id.*

First, the Commission majority noted the undersupply and oversupply conditions that resulted, in part, due to an inaccurate demand forecast. See Second Remand Determination at 6-7; Final Determination at 41 (Comm'r Miller, dissenting views). Substantial record evidence supports the Commission's finding that the undersupply condition and the following oversupply condition significantly contributed to the domestic price increases in 1995 and subsequent price declines in 1996. *See* Staff Report at V-3.

The Commission majority also cited the "learning curve" effect as a factor in the domestic price declines, while noting that "the decline was temporarily interrupted by the inaccurate forecast of demand growth in 1995 . . . ." *See* Second Remand Determination at 7. The learning curve is a phenomenon by which a firm's manufacturing costs, and hence its prices, decrease as it becomes more efficient in

[15] Regarding products 4 and 6, the Commission majority stated that the price data collected on these products "[were] not useful in [its] analysis because of the very small quantities sold." Second Remand Determination at 6 n.19; *see also* Final Determination at 42 n.16 (Comm'r Miller, dissenting views). "[I]t is within the Commission's discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence." *Maine Potato Council v. United States*, 9 CIT 293, 300, 613 F. Supp. 1237, 1244 (1985). The record supports the Commission's conclusion that the quantities of products 4 and 6 were relatively small. *See* Staff Report at IV-7, Table IV-3, at V-11 to V-12, Table V-4, and at V-15 to V-16, Table V-6. Therefore, the Commission reasonably discounted the data regarding products 4 and 6 in its analysis.

production. *See* Final Determination at 22. Substantial record evidence supports the Commission's conclusion that the learning curve played a role in the domestic price declines. *See* Staff Report at I-20 and V-1.[16]

Based on the evidence indicating a lack of correlation between the Taiwanese imports and domestic prices, as well as the evidence that other market factors caused the domestic price declines,[17] the Commission majority reasonably concluded that the subject imports did not significantly depress or suppress domestic prices.

3. *Impact*

The statute directs the Commission to examine the consequent impact of the subject imports on the domestic industry. *See* 19 U.S.C. § 1677(7)(C)(iii). The Commission must consider "all relevant economic factors which have a bearing on the state of the industry in the United States, including but not limited to" those enumerated. *Id.*; *see also supra* at n.9. In its second remand determination, the Commission majority adopted Commissioner Miller's views regarding the impact of the subject imports on the domestic industry. *See* Second Remand Determination at 8.

In her dissenting views to the original determination, Commissioner Miller analyzed each of the factors enumerated in § 1677(7)(C)(iii) and found that the domestic industry's financial performance had worsened in the latter years of the POI. *See* Final Determination at 43-45 (Comm'r Miller, dissenting views). Nevertheless, Miller concluded that the subject imports did not cause the deterioration. *See id.* at 45.

Consistent with Miller's analysis, the Commission majority concluded that the domestic industry suffered a "declining financial performance primarily [as] a result of price declines . . . ." Second Remand Determination at 8. Because the subject imports did not have significant price depressing effects, however, the Commission concluded that the subject imports did not make a material contribution to the domestic industry's injury. *See id.*

The Commission majority's determination is reasonable. In *Taiwan II*, we noted that the record reasonably supported the conclusion that the domestic industry was suffering material injury as a result of its weakened financial condition in 1996 and 1997. *See* 24 CIT at ___, slip op. 00-37 at 50-51. In addition, based on the evidence of the domestic price declines beginning in the last quarter of 1995 and continuing through 1996, *see* Staff Report at V-6 to V-16, Tables V-1 to V-6, the Commission reasonably concluded that price declines were a

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[16] As Micron points out, *see* Micron Cmts. at 25, in *Taiwan II* we held that the first remand determination "adequately explained how [the Commission] ensured that it did not attribute the price depressing effects of the learning curve to the Taiwanese imports." 24 CIT at ___, slip op. 00-37 at 36. Nevertheless, the record also reasonably leads to the conclusion that the learning curve contributed to the domestic price declines.

[17] In addition, the Commission noted the competition in products 1, 2, 3, and 5 from non-subject imports, although the Commission appears to ascribe less weight to this factor than to the demand misforecast and the learning curve effect. *See* Second Remand Determination at 7 n.21.

primary cause of the domestic industry's poor financial condition. Finally, because substantial evidence supports the conclusion that the subject imports did not have significant price depressing effects, the Commission reasonably concluded that the subject imports did not make a material contribution to the domestic industry's injury.

In addition, the Commission majority discussed the evidence of lost revenue allegations. *See* Second Remand Determination at 8. In the first remand determination, Commissioner Bragg concluded that the "relationship between [the confirmed revenue losses for product 5] and industry operating income [losses] . . . provide[d] perhaps the most direct possible evidence of the significant effects of subject imports." First Remand Determination at 19 (citing Staff Report at V-24 to V-28, Table V-8, and at VI-7, Table VI-3). In *Taiwan II*, however, we held that, absent an explanation of how it was reasonable to rely on four of the confirmed lost revenue allegations (the "4Q95-1Q97" allegations), the Court could not sustain as supported by substantial evidence the conclusion that the instances of lost revenues for product 5 had a significant impact on the domestic industry's operating income. See 24 CIT at ___, slip op. 00-37 at 53.

"The Commission calculates lost revenues from the equation: (producer's initial U.S. price quote - U.S. price quote accepted by buyer) X (quantity sold)." *Id.* at ___, slip op. 00-37 at 52. The four 4Q95-1Q97 allegations bore a quote date encompassing the fourth quarter of 1995 through the first quarter of 1997. Considering the steady decline in domestic prices from late 1995 through 1997, the Court reasoned that the use of such a long quote date potentially inflated the measurement of revenue lost due to competition from the subject imports. *See id.* (citing Staff Report at V-13 to V-14, Table V, and at V-27, Table V-8). Combined, the 4Q95-1Q97 allegations accounted for approximately 94% of all confirmed lost revenue allegations for product 5. *See* Staff Report at V-24 to V-28, Table V-8.

On second remand, the Commission reopened the record to gather additional information on the 1Q95-4Q97 lost revenue allegations. The Commission learned that the purchaser's records regarding these allegations had been destroyed. *See* May 25, 2000 Mem. INV-X-115, Lynn Featherstone to the Commission (List 2, Doc. 409) at 2. The Commission, however, did speak with the employee who had confirmed the original lost revenue allegations. The employee indicated that prices were typically negotiated on a quarterly basis and that the differential in price quotes in the allegations stayed about the same from the fourth quarter of 1995 through the first quarter of 1997. *See id.* In addition, the employee "indicated that his firm probably did use import quotes to get prices reduced in order to maximize profitability." *Id.* at 3.

In its second remand determination, the Commission majority concluded that "the lost revenue allegations in this investigation [did] not constitute sufficient evidence to indicate that the subject imports had a significant impact on the domestic industry." Second Remand

Determination at 8. The Commission noted that, by quantity and value, the 4Q95-1Q97 allegations constituted "the great bulk" of the lost revenues. *See id.* Yet, since prices were negotiated on a quarterly basis, the Commission could not precisely quantify the amount of revenue implicated by these allegations without the rejected and accepted price quotes for each quarter of the time period covered in the allegation (the fourth quarter of 1995 through the first quarter of 1997). *See id.* at 8 n.23. Consequently, although the Commission found that the domestic revenues lost due to the 4Q95-1Q97 allegations "[did] not appear insubstantial[,]" it nevertheless concluded that, "in the absence of significant price depressing or suppressing effects by the subject imports, . . . the lost revenue allegations alone were insufficient to demonstrate that the subject imports themselves had a significant impact on the domestic industry." *Id.* at 8.

The Commission's conclusions are reasonable. "[I]t is within the Commission's discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence." *Maine Potato*, 9 CIT at 300, 613 F. Supp. at 1244. Given that the purchaser's records regarding the 4Q95-1Q97 allegations had been destroyed, it was reasonable for the Commission to accord less weight to their value. Moreover, the evidence indicating that Taiwanese product 5 generally oversold the domestic product in 1996 and 1997 directly undermines the conclusion that U.S. producers suffered heavy revenue losses in product 5 due to price competition from Taiwanese imports. *See* Staff Report at V-14, Table V-5. Taken together with the substantial evidence that the subject imports did not have significant price depressing or suppressing effects, the Commission reasonably concluded that lost revenue allegations alone were insufficient to demonstrate that the subject imports themselves had a material negative impact on the domestic industry.

4. *Conclusion*

Substantial evidence supports the Commission majority's conclusion that the subject imports did not make a material contribution to the domestic industry's injury. Therefore, the Court sustains the Commission's negative material injury determination.

B. *Threat of Material Injury*

Pursuant to 19 U.S.C. § 1673d(b)(1)(A), the Commission majority also addressed whether the domestic SRAM industry is threatened

with material injury.[18]

In examining the causal connection between the LTFV imports and the threatened material injury, the statute requires the Commission to consider, "among other relevant economic factors," nine enumerated factors. Seven factors are relevant to consider in this case:[19]

> (II) any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports,
>
> (III) a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports,
>
> (IV) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports,
>
> (V) inventories of the subject merchandise,
>
> (VI) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products,
>
> . . . .
>
> (VIII) the actual and potential negative effects on the existing development and production efforts of the domestic industry, in-

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[18] As Defendant points out, Micron did not challenge the Commission's threat analysis in Micron's initial comments. *See* Micron Cmts. Therefore, Defendant did not address the threat analysis in its rebuttal brief. *See* Def.'s Rebuttal to Micron Cmts. at 1 n.1 ("Micron did not submit comments on the Commission's discussion on remand of the threat of material injury, and thus should be regarded as being in agreement with it."). In its subsequent rebuttal to Plaintiffs' comments, however, Micron *did* challenge the Commission's threat analysis in the second remand determination. *See* Micron Cmts. in Resp. to Pls.' Cmts at 14-15. In response, Defendant asserts that Micron improperly raised the threat issue for the first time in its rebuttal to Plaintiffs' comments, denying the Commission an opportunity to respond.

The Court determines that it is appropriate to review the Commission's threat analysis on second remand. First, despite the fact that Micron has not challenged the Commission's threat determination at the administrative level, we do not find that the rule of exhaustion of remedies precludes the Court from reviewing the issue. The rule of exhaustion of administrative remedies is neither absolute nor inflexible. *See* 28 U.S.C. § 2637(d)(1994)(the court "shall, *where appropriate*, require the exhaustion of administrative remedies")(emphasis added); *see also United States v. Priority Products, Inc.*, 793 F.2d 296, 300 (Fed. Cir. 1986)("Congress appears to have . . . grant[ed] the Court of International Trade some discretion to excuse the failure to exhaust administrative remedies."). Here, it is appropriate for the Court to review the Commission's threat determination because the Commission clearly considered the issue. See Second Remand Determination at 9. Moreover, in conducting its second remand, the Commission only invited comments from parties concerning the new information gathered regarding the lost revenue allegations. *See Static Random Access Memory Semiconductors From Taiwan*, 65 Fed. Reg. 31,928 (Commission, May 19, 2000)(notice and scheduling of remand proceedings). In addition, although Micron should have raised the threat issue in its initial comments to the Court, the Commission is not prejudiced by not having the opportunity to respond to Micron's rebuttal comments, because the Court affirms the Commission's negative threat determination. *See* discussion *infra* pp. 38-44.

[19] Neither a countervailable subsidy (factor I) nor a raw agricultural product (factor VII) is involved in this case.

> cluding efforts to develop a derivative or more advanced version of the domestic like product, and
>
> (IX) any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time).

19 U.S.C. § 1677(7)(F)(i).[20]

The Commission evaluates these factors by applying the standards set forth in § 1677(7)(F)(ii). The Commission is to "consider the factors set forth [above] as a whole in making a determination of whether further dumped . . . imports are imminent and whether material injury by reason of imports would occur unless an order is issued . . . ." *Id.* Moreover, the "determination may not be made on the basis of mere conjecture or supposition." *Id.* In sum, "the Commission must determine whether the LTFV imports themselves made a material contribution to the threatened material injury." *NEC Corp. v. Dep't of Commerce*, 22 CIT ___, ___, 36 F. Supp. 2d 380, 392 (1998).

In its second remand determination, the Commission determined that the U.S. SRAM industry is not threatened with material injury by reason of the Taiwanese imports. *See* Second Remand Determination at 9. In doing so, the Commission majority adopted Commissioner Miller's discussion of threat of material injury from her dissenting views to the original determination. *See id.; see also* Final Determination at 45-48 (Comm'r Miller, dissenting). Below, the Court reviews Commissioner Miller's analysis regarding each of the relevant statutory factors.

Regarding factor II (production capacity), Commissioner Miller concluded, "Despite the planned increases over the longer term, as well as the relative ease with which production capacity can be shifted between different types of semiconductors, I do not find evidence that imminent and significant increases in SRAM exports to the United States are likely." *See* Final Determination at 47 (Comm'r Miller, dissenting). The record reasonably supports this conclusion. As Commissioner Miller pointed out, several foreign producers reported to the Commission that new capacity would not be dedicated to SRAM production. *See* Staff Report at VII-9 to VII-11. Moreover, for the first year following the POI, 1998, foreign producers projected declines in both capacity and production of SRAMs. *See id.* at VII-13, Table VII-2. Given that the Taiwanese industry's capacity for cased SRAMs[21] was lower in 1997 than in either 1995 or 1996, it was reasonable for the Commission to rely on the industry's projections. *See id.* Therefore, Commissioner Miller reasonably concluded based on the record that production capacity in Taiwan did not indicate a like-

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[20] "The presence or absence of any factor which the Commission is required to consider under [§ 1677(7)(F)(i)] shall not necessarily give decisive guidance with respect to the determination." 19 U.S.C. § 1677(7)(F)(ii).

[21] Over the POI, the Taiwanese industry exported significantly more cased (or assembled) SRAMs to the United States than the two other SRAM types investigated, uncased (or unassembled) SRAMs and SRAM memory modules. See Staff Report at VII-3, Table VII-2.

lihood of increased subject imports to the United States.

Regarding factor III (volume and market penetration), Commissioner Miller concluded, "I do not find that the volume and market penetration of the subject imports indicates a likelihood of substantially increased imports." Final Determination at 47 (Comm'r Miller, dissenting). Substantial record evidence supports this conclusion. First, while the absolute volume of total Taiwanese SRAM exports to the United States increased over the POI, the number was projected to decrease in 1998. *See* Staff Report at VII-13, Table VII-2. Moreover, as a share of total Taiwanese shipments, SRAM exports to the United States remained relatively steady over the POI. *See id.* at VII-14, Table VII-2. Therefore, Commissioner Miller reasonably concluded that the record did not indicate a likelihood of substantially increased subject imports to the United States.

Regarding factor IV (price effects), Commissioner Miller concluded, "I find nothing in the record to suggest that [the subject] imports are likely to have significant price effects in the future, especially in light of the widespread availability of non-subject imports." Final Determination at 47 (Comm'r Miller, dissenting). As discussed above, substantial evidence supports the conclusion that the subject imports did not have significant price effects during the POI. Moreover, the great weight of the record indicates that non-subject imports were competitive with U.S. SRAMs and maintained a much higher share of the U.S. market throughout the POI. *See* Staff Report at I-10, Table I-1, at I-11, at I-13, Table I-2, at II-3 to II-4, at II-9, at II-12, at II-13, at II-15, at IV-7, Table IV-3, and at IV-9, Table IV-4. Therefore, Commissioner Miller reasonably concluded that the subject imports were not likely to have significant price effects in the future.

Regarding factor V (inventories of the subject merchandise), Commissioner Miller concluded the "inventories of the subject imports also indicate[d] that substantially increased SRAM imports [were] unlikely." Final Determination at 47 (Comm'r Miller, dissenting). As Commissioner Miller pointed out, inventories of Taiwanese SRAMs held by U.S. importers increased in absolute quantity over the POI, but declined as a share of total U.S. imports in the latter part of the POI. *See* Staff Report at VII-15, Table VII-6. Moreover, inventories of SRAMs held in Taiwan decreased in 1997 in both absolute terms and relative to total Taiwanese shipments. *See id.* at VII-13 to VII-14, Table VII-2. Therefore, the record reasonably supports Commissioner Miller's conclusion that the inventories of the subject imports did not indicate that substantially increased imports were likely.

Regarding factor VI (potential for product shifting), Commissioner Miller concluded that producers of SRAMs in Taiwan are able to shift production from other memory integrated circuit products to SRAMs. *See* Final Determination at 46 (Comm'r Miller, dissenting)(citing Staff Report at VII-7). Because several Taiwanese producers projected a decline in both capacity and product of SRAMs, however, Commissioner Miller did not emphasize this factor. *See* Staff Report at VII-9 to VII-11, and at VII-13, Table VII-2. The Commission has discretion

to weigh the significance of each factor in light of the circumstances. *See Iwatsu Elec.*, 15 CIT at 49, 758 F. Supp. at 1510-11. Under the circumstances of this case, it was reasonable for Commissioner Miller not to ascribe substantial weight to the ability of Taiwanese SRAM manufacturers to product-shift.

Regarding factor VIII (domestic development and production), Commissioner Miller concluded, "I do not find that the subject imports from Taiwan have had an actual or potential negative effect on the development and production efforts of the domestic industry." Final Determination at 48 (Comm'r Miller, dissenting). The record indicates that, although domestic capital expenditures declined in 1996 and 1997, expenditures had doubled in 1995; thus, the 1997 level was still greater than the amount spent in 1994, the first year of the POI. *See* Staff Report at VI-11, Table VI-4. Meanwhile, although research and development expenses had decreased in 1997, the 1997 level was still almost double the 1994 level. *See id.* Based on this record evidence, Commissioner Miller reasonably determined that the subject imports did not have significant actual or potential negative effects on development and production of SRAMs in the United States.

Finally, Commissioner Miller found "no indication of any 'other demonstrable adverse trends' that indicate[d] that there [was] likely to be material injury by reason of the subject imports." Final Determination at 48 (Comm'r Miller, dissenting)(applying 19 U.S.C. § 1677(7)(F)(i)(IX)). Upon review of the record as a whole, this conclusion appears reasonable.

In its rebuttal brief, Micron argues that the record evidence indicates that the domestic industry is threatened with material injury by reason of the subject imports. *See* Micron's Cmts. in Resp. to Pls.' Cmts. at 14-15. That Micron "can hypothesize a reasonable basis for a contrary determination[, however,] is neither surprising nor persuasive." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 936 (1984). The Court concludes that, based on a consideration of the record evidence and the § 1677(7)(F)(i) factors as a whole, the Commission majority reasonably determined that the U.S. SRAM industry is not threatened with material injury by reason of the subject imports.

CONCLUSION

The Commission's negative material injury and negative threat of material injury determinations are supported by substantial evidence and are otherwise in accordance with law. Therefore, the Commission's second remand determination is affirmed. Judgment will be entered accordingly.

DONALD C. POGUE
Judge

Dated: August 29, 2000
New York, New York

TAIWAN SEMICONDUCTOR INDUSTRY ASSOCIATION, ET AL., PLAINTIFFS, AND MOTOROLA, INC., PLAINTIFF-INTERVENOR, V. UNITED STATES, DEFENDANT, AND MICRON TECHNOLOGY, INC., DEFENDANT-INTERVENOR

Court No. 98-05-01460

Before: POGUE, *Judge*

JUDGMENT

This action has been duly submitted for decision, and this Court, after due deliberation, has rendered a decision herein; now, in conformity with that decision, it is hereby

ORDERED that the International Trade Commission's second remand determination in Static Random Access Memory Semiconductors From Taiwan, Inv. No. 731-TA-762 (June 23, 2000), is affirmed; and it is further,

ORDERED that final judgment is entered accordingly.

DONALD C. POGUE
Judge

Dated: August 29, 2000
New York, New York

(Slip Op. 00-114)

AMERICAN PERMAN, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT.

Court No. 94-10-00589

Plaintiff, American Permac, Inc., argues it is entitled to judgment as a matter of law because the entries at issue were liquidated by operation of law prior to the United States Customs Service's (Customs) 1994 liquidation of the entries.

Defendant, United States, argues it is entitled to judgment as a matter of law because the entries at issue were not liquidated by operation of law prior to Customs's 1994 liquidation. Also, defendant argues it is entitled to judgment as a matter of law on its counterclaims because Customs's 1994 liquidation of the entries at issue was valid but contained errors. Plaintiff argues the Court may not consider defendant's counterclaims due to its lack of subject matter jurisdiction or, alternatively, because the issues presented are *res judicata*.

Held: The Court finds there are no genuine issues of material fact, and summary judgment is appropriate. In accordance with the United States Court of Appeals for the Federal Circuit's decision in *American Permac, Inc. v. United States*, 191 F.3d 1380 (Fed. Cir. 1999), plaintiff's motion for summary judgment is denied, and defendant's cross-motion for summary judgment is granted. Also, as this Court finds it has subject matter jurisdiction to consider defendant's counterclaims pursuant to 28 U.S.C. § 1583 (1994), and this Court finds plaintiff's *res judicata* defense waived, defendant's cross-motion for summary judgment on its counterclaims is granted.

Date: September 1, 2000

Barnes, Richardson & Colburn (*Rufus E. Jarman, Jr.*), New York, New York; *Alan Goggins*, of Counsel, for plaintiff.

David W. Ogden, Assistant Attorney General of the United States; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*James A. Curley*); *Edward N. Maurer*, Office of
the Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of
Counsel, for defendant.

OPINION

CARMAN, *Chief Judge:* This case is before this Court on remand from the United States Court of Appeals for the Federal Circuit (Federal Circuit). *See American Permac, Inc. v. United States*, 191 F.3d 1380 (Fed. Cir. 1999). Plaintiff, American Permac, Inc. (American Permac), argues it is entitled to judgment as a matter of law because the entries at issue were liquidated by operation of law prior to the United States Customs Service's (Customs) 1994 liquidation of the entries.

Defendant, United States, argues it is entitled to judgment as a matter of law because the entries at issue were not liquidated by operation of law prior to Customs's 1994 liquidation. Also, defendant argues it is entitled to judgment as a matter of law on its counterclaims because Customs's 1994 liquidation of the entries at issue, although valid, contained errors. Plaintiff argues the Court may not consider defendant's counterclaims due to its lack of subject matter

jurisdiction or, alternatively, because the issues presented are *res judicata*. This Court has jurisdiction pursuant to 28 U.S.C. § 1581(a).

BACKGROUND

The facts in this case have been recounted in greater detail in *American Permac, Inc. v. United States*, 984 F. Supp. 621, 622 (CIT 1997), and *American Permac, Inc. v. United States*, 191 F.3d at 1381. The facts pertinent to this opinion are set forth below.

This case involves three entries of dry-cleaning machinery from Germany. After Customs liquidated the three entries in 1994, assessing antidumping duties, plaintiff timely filed protests against the 1994 liquidations alleging the entries had been liquidated by operation of law, *i.e.*, without antidumping duties, prior to Customs's 1994 liquidation. After Customs denied the protests, plaintiff timely filed a summons with this Court asserting the Customs's 1994 "liquidation and assessment of antidumping duties [on the three entries] were barred by the statute of limitations," (Summons at 2.), as the entries were liquidated by operation of law prior to that date.

In its answer to plaintiff's complaint, defendant denied plaintiff's claim and filed two counterclaims asserting that while Customs had validly liquidated the entries at issue, Customs had erred by underassessing the antidumping duties owed on two of the three entries at issue.[1] Customs under-assessed antidumping duties on the two entries in the amount of $7,186.04.[2] In response to defendant's counterclaims, plaintiff raised no defenses in its pleadings.[3]
(*See* [Plaintiff's] Reply.)

In 1997, this Court held the entries at issue were liquidated by operation of law and thus declined to address defendant's counterclaims. *See American Permac*, 984 F. Supp. at 629. On appeal, however, the Federal Circuit reversed this Court and held the entries were not liquidated by operation of law and remanded the matter for further proceedings. *See American Permac*, 191 F.3d at 1382. Subsequent to the remand and upon request of the parties, this Court ordered the parties to submit "supplemental briefing concerning the government's counterclaims." (Scheduling Order (Stipulation) signed January 31, 2000.)

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[1] The entries covered by defendant's counterclaims are Entry Nos. 515334-3 and 515210-8.

[2] Defendant, in its Statement of Material Facts Not in Dispute in Defendant's Opposition to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment (Defendant's Facts), asserted the "difference between the correct amount of antidumping duty on Entry No. 515334-3, and the amount of antidumping duty assessed on this entry at liquidation, is $4,607.75," (*id.* at ¶ 7.), and the "difference . . . on Entry No. 515210-8 . . . is $2,578.29." (*Id.* at ¶ 11; *see also* Answer and Counterclaims at ¶¶ 42, 45, 47, 50.)

[3] The Court notes in response to Defendant's Facts where defendant asserted the material facts of its counterclaims, plaintiff stated, "These antidumping duties are not 'correct' because the entries were liquidated by operation of law without the assessment of antidumping duties. Without the descriptive term 'correct,' plaintiff admits the statements in paragraphs 1-11 [material facts of defendant's counterclaims] of [Defendant's Facts]." (Facts Not in Dispute in Plaintiff's Reply Brief In Support of Its Motion for Summary Judgment and In Opposition to Defendant's Cross-Motion for Summary Judgment at 3.)

CONTENTIONS OF THE PARTIES

A. *Plaintiff*

Plaintiff, American Permac, argues the Court may not properly consider or, alternatively, the Court should deny defendant's counterclaims because no protest was filed to contest the Customs's determinations involved in defendant's counterclaims, *i.e.*, Customs's assessment of antidumping duties. Therefore those determinations are final and conclusive on all parties under 19 U.S.C. § 1514 (1994).[4] Citing *United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550 (Fed. Cir. 1997) and *Export Packers Co., Ltd. v. United States*, 795 F. Supp. 422 (CIT 1992), plaintiff argues a protest "defines the scope of what is contested, and all other aspects of the liquidation not contested become final and conclusive." (Plaintiff's Supplemental Brief on Remand Regarding Defendant's Counterclaims at 3.) Accordingly, when a defendant counterclaims on an issue not raised in a plaintiff's protest, the Court may not consider the counterclaim because the Court lacks subject matter jurisdiction or the issue posed by the counterclaim is *res judicata*, *i.e.*, an issue already judged.[5]

In this matter, plaintiff claims the only issue raised in its protest was the validity of Customs's 1994 liquidation of the entries at issue, *i.e.*, whether the entries at issue were liquidated by operation of law prior to Customs's 1994 liquidations. According to plaintiff, defendant's counterclaims involve the amount of antidumping duties assessed in Customs's liquidations, a separate and distinct issue not challenged by plaintiff. Therefore, plaintiff argues defendant may not now assert counterclaims on the amount of antidumping duties assessed as it is final and conclusive under the statute. To bolster its argument, plaintiff notes the statute treats the assessment of duties and the validity of liquidation as separate issues by enumerating the issues in separate

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[4] In relevant part, 19 U.S.C. § 1514(a) (1994) states:

> Protests against decisions of Customs Service
>
> (a) Finality of decisions; return of papers
>
> Except as provided in subsection (b) of this section, . . . and section 1520 of this title (relating to refunds and errors), decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to)
>
> * * *
>
> (2) the classification and rate and amount of duties chargeable;
>
> * * *
>
> (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof;
>
> * * *
>
> shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of Title 28 within the time prescribed by section 2636 of that title.

[5] To support its argument regarding *res judicata*, plaintiff cites *Smith v. United States*, 1 U.S. Cust. App. 489, 491 (1911) (once a Customs' decision becomes final and conclusive on liquidation, the decision is "*res adjudicata*, unless appeal therefrom is taken in the time by statute allowed").

subsections of the statute, 19 U.S.C. § 1514(a)(3) and 19 U.S.C. § 1514(a)(5), respectively.

Accordingly, plaintiff argues the Court may not properly consider defendant's counterclaims due to lack of subject matter jurisdiction or, alternatively, the Court should deny defendant's counterclaims as the issues involved are *res judicata*.

B. *Defendant*

Defendant, United States, in its cross-motion for summary judgment claims that, pursuant to 28 U.S.C. § 1583 (1994), Customs under-assessed the amount of antidumping duties on two of the entries at issue. Defendant argues it is entitled to collect $7,186.04 plus prejudgment interest in under-assessed antidumping duties from plaintiff.

Defendant contends the Court may properly consider its counterclaims under 28 U.S.C. § 1583, which states, in relevant part, the Court of International Trade "shall have exclusive jurisdiction to render judgment upon any counterclaim . . . if [] such claim . . . involves the imported merchandise that is the subject of such civil action." Defendant maintains there is no dispute among the parties that its counterclaims involve those entries cited in plaintiff's claim, therefore, the Court has subject matter jurisdiction over defendant's counterclaims.

Defendant also argues plaintiff's other arguments against the Court's consideration of the defendant's counterclaims are meritless. First, defendant contends plaintiff's arguments may not be considered by the Court because plaintiff's arguments in opposition to defendant's counterclaims have nothing to do with the effect of the appellate court's decision. Therefore, plaintiff's arguments are beyond the scope of the supplemental brief allowed by the Court in this matter. Accordingly, it is inappropriate for the Court to consider these arguments.

Second, defendant contends, contrary to plaintiff's assertions, the issue of assessment of duties is not final and conclusive under 19 U.S.C. § 1514, because plaintiff challenged both the validity of Customs' liquidation and the assessment of antidumping duties in its protest to Customs and summons before the Court. (*See* Summons at 2.) Moreover, defendant asserts plaintiff's claim that the entries at issue were liquidated by operation of law under 19 U.S.C. § 1504(d), requires the Court to determine whether the actual liquidation is valid and, if so, the correct rate and amount of duty on the entry. Defendant argues proper liquidation and the proper assessment of duties are necessarily linked. Therefore, defendant argues its counterclaims regarding the assessment of duties may be properly considered by this Court.

Finally, defendant argues plaintiff's reliance on *Cherry Hill* is misplaced. *See Cherry Hill*, 112 F.3d at 1550. Defendant argues the situation at bar is factually distinct from that presented in *Cherry Hill*.

Accordingly, defendant argues the Court should consider its counterclaims and its cross-motion for summary judgment should be granted.

STANDARD OF REVIEW

This case is before the Court on plaintiff's motion and defendant's cross-motion for summary judgment. Summary judgment is appropriate if, based on the papers before the Court, "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." U.S. CIT R. 56(c). The Court finds summary judgment is appropriate in this case because there are no genuine issues of material fact in dispute. *See United States v. Shabahang Persian Carpets, Ltd.*, 963 F. Supp. 1207, 1209 (CIT 1997).

DISCUSSION

This matter is before the Court on remand from the United States Court of Appeals for the Federal Circuit. *See American Permac*, 191 F.3d at 1381.

On appeal, the Federal Circuit reversed and remanded this Court's determination in *American Permac*, 984 F. Supp. at 621, holding "American Permac's argument for liquidation by operation of law must fail." *American Permac*, 191 F.3d at 1382. Therefore, all that remains for this court to decide on remand are the issues brought forth by defendant's cross-motion for summary judgment on its counterclaims.

A. *Jurisdiction*

Plaintiff argues this Court may not consider defendant's counterclaims because it lacks subject matter jurisdiction. This Court disagrees.

Section 1583 of Title 28 of the United States Code states, in a civil action the Court of International Trade "shall have exclusive jurisdiction to render judgment upon any counterclaim . . . if . . . such claim . . . involves the imported merchandise that is the subject matter of such civil action." 28 U.S.C. § 1583(1); *see Tikal Distrib. Corp. v. United States*, 93 F. Supp. 2d 1269, 1275 (CIT 2000). Accordingly, this Court would not have jurisdiction over defendant's counterclaims if they did not concern the same merchandise as plaintiff's claim. *See Export Packers Co., Ltd. v. United States*, 795 F. Supp. 422, 426 (CIT 1992); *Shabahang*, 963 F. Supp. at 1210.

In this case, there appears to be no dispute among the parties that defendant's counterclaims involve those entries at issue in plaintiff's claim. Therefore, pursuant to 28 U.S.C. § 1583, the Court finds it has subject matter jurisdiction over defendant's counterclaims.[6]

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[6] Plaintiff cites to *Export Packers Co., Ltd. v. United States*, 795 F. Supp. 422 (CIT 1992), for the proposition that since plaintiff failed to protest classification of the merchandise, the Court has no jurisdiction over counterclaims concerning classification. Plaintiff's citation is inapposite. In *Export Packers*, the Court dismissed defendant's counterclaim because it determined defendant's counterclaim and plaintiff's claim "involved separate and distinct merchandise." *Id.* at 425-426. Here, both parties agree plaintiff's claim and defendant's counterclaims involve the same merchandise.

B. *Res Judicata*[7]

Plaintiff also argues this Court may not consider the issues brought forth in defendant's counterclaims as they are *res judicata*. Plaintiff appears to maintain that because it did not protest Customs' assessment of antidumping duties, Customs's assessment determinations are final and conclusive under 19 U.S.C. § 1514(a). Therefore, plaintiff contends defendant's counterclaims involve issues for which final determinations have been rendered. This Court will not consider the merits of plaintiff's argument.

Pursuant to U.S. CIT R. 8(d), *res judicata* is a defense which must be affirmatively pled in response to a preceding pleading. Failure to plead *res judicata* as an affirmative defense results in its waiver. *See Aimcor and SKW Metals & Alloys, Inc. v. United States*, 69 F. Supp. 2d 1345, 1348 n.1 (CIT 1999).

In this matter, the Court notes plaintiff did not affirmatively plead its affirmative defense of *res judicata* in response to defendant's counterclaims. (*See* [Plaintiff's] Reply.) In fact, it appears the *res judicata* defense was only first raised in plaintiff's supplemental brief on defendant's counterclaims. Its presentment at this juncture is simply not timely. Accordingly, this Court will not address the merits of plaintiff's *res judicata* defense.

C. *Defendant's Counterclaims*

Pursuant to 28 U.S.C. § 1583, defendant seeks to collect from plaintiff $7,186.04 in under-assessed antidumping duties plus prejudgment interest on two entries of dry-cleaning machinery imported from Germany. Defendant claims it erroneously assessed the antidumping duties in the first instance.

The Court notes plaintiff put forth no affirmative defense to defendant's counterclaims in its reply pleading. It appears the only defense raised by plaintiff against defendant's counterclaims was its claim that the entries at issue were liquidated by operation of law. (*See* Facts Not in Dispute in Defendant's Reply Brief in Support of Its Motion for Summary Judgment and in Opposition to Defendant's Cross-Motion for Summary Judgment at 3.) Also, in its reply brief plaintiff admits to the substantive facts raised in defendant's counterclaims.[8] (*See id.*)

As the Federal Circuit determined the entries at issue in plaintiff's claim were not liquidated by operation of law, *American Permac*, 191 F.3d at 1382, and plaintiff admits Customs under-assessed the antidumping duties on the entries at issue, this Court grants defendant's cross-motion for summary judgment on its counterclaims.

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[7] *Res judicata* is the "[r]ule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties . . . and . . . constitutes an absolute bar to a subsequent action involving the same claim." BLACK'S LAW DICTIONARY 1305 (6th ed. 1990).

[8] *See supra* note 3.

D. *Prejudgment Interest*

Defendant also seeks to recover prejudgment interest on the amount of under-assessed duties. This Court declines to make such an award.

It is within this Court's discretion to award prejudgment interest at a rate provided for in 28 U.S.C. § 2644 (1994), in cases where no statute specifically authorizes such an award. *See United States v. Reul*, 959 F.2d 1572, 1577 (Fed. Cir. 1992). This Court declines to exercise its discretion to award interest because it finds it was reasonable for plaintiff to have believed its entries were liquidated by operation of law and as a result Customs was foreclosed from assessing any antidumping duties. *See Eastern Air Lines, Inc. v. Atlantic Richfield Co.*, 712 F.2d 1402, 1410 (Temp. Emer. Ct. App. 1983) (denying prejudgment interest where underlying recovery is uncertain) *cited in United States v. Jac Natori Co., Ltd.*, 1998 WL 864772, at *4 (CIT Dec. 11, 1998).

CONCLUSION

Pursuant to the Federal Circuit's decision in *American Permac, Inc. v. United States*, 191 F.3d 1380 (Fed. Cir. 1999), and for and in accordance with the reasons stated above, plaintiff's motion for summary judgment is denied, and defendant's cross-motion for summary judgment is granted.

GREGORY W. CARMAN
Chief Judge

Dated: September 1, 2000
New York, New York

(Slip Op. 00-114)

AMERICAN PERMAN, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT.

Court No. 94-10-00589

ORDER

This matter having been remanded by the Court of Appeals for the Federal Circuit in *American Permac, Inc. v. United States*, 191 F.3d 1380 (Fed. Cir. 1999), and this Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision, it is hereby

ORDERED that plaintiff's motion for summary judgement is denied; and it is further

ORDERED that defendant's cross-motion for summary judgement is granted; and it is further

ORDERED that defendant's request for prejudgment interest is denied; and it is further

ORDERED that the complaint is dismissed.

GREGORY W. CARMAN
Chief Judge

Dated: September 1, 2000
New York, New York

(Slip Op. 00-115)

DAL-TILE CORPORATION, PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Court No. 95-11-01550

Plaintiff, Dal-Tile Corporation (Dal-Tile), moves for summary judgment pursuant to U.S. CIT R. 56(a), contending it is entitled to judgment as a matter of law because under 19 U.S.C. § 1505 (1994), it is entitled to interest on eight million dollars of Customs duties deposited refunded to it by the United States Customs Service (Customs).

Defendant, United States, opposes plaintiff's motion and cross-moves for summary judgment pursuant to U.S. CIT R. 56(b), contending it is entitled to judgment as a matter of law because under 19 U.S.C. § 1505, plaintiff is entitled to interest on no more than the Customs duties deposited at entry on the nine representative entries reliquidated by Customs.

Held: The Court finds there are no genuine issues of material fact and summary judgment is appropriate. Plaintiff's motion for summary judgment is granted and defendant's cross-motion for summary judgment is denied.

(Dated: September 1, 2000)

Ross & Hardies (*Joseph S. Kaplan*), New York, New York, for plaintiff.

David W. Ogden, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*James A. Curley*); *Edward N. Maurer*, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of Counsel, for defendant.

OPINION

CARMAN, *Chief Judge*: Plaintiff, Dal-Tile Corporation (Dal-Tile), moves for summary judgment pursuant to U.S. CIT R. 56(a), contending it is entitled to judgment as a matter of law because under 19 U.S.C. § 1505 (1994)[1], it is entitled to interest on eight million dollars of Customs duties deposited refunded to it by the United States Customs Service (Customs).

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[1] 19 U.S.C. § 1505 (1994) states, in relevant part:

(b) Collection or refund of duties, fees, and interest due upon liquidation or reliquidation.

The Customs Service shall . . . refund any excess moneys deposited, together with interest thereon, as determined on a liquidation or reliquidation.

(c) Interest

Interest assessed due to an underpayment of duties, fees, or interest shall accrue, at a rate determined by the Secretary, from the date the importer of record is required to deposit estimated duties, fees, and interest to the date of liquidation or reliquidation of the applicable entry or reconciliation. Interest on excess moneys deposited shall accrue, at a rate determined by the Secretary, from the date the importer of record deposits estimated duties, fees, and interest . . . to the date of liquidation or reliquidation of the applicable entry or reconciliation.

Defendant, United States, opposes plaintiff's motion and cross-moves for summary judgment pursuant to U.S. CIT R. 56(b), contending it is entitled to judgment as a matter of law because under 19 U.S.C. § 1505, plaintiff is entitled to interest on no more than the Customs duties deposited at entry on the nine representative entries reliquidated by Customs. This Court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1994).

BACKGROUND

Plaintiff, Dal-Tile, is an importer of wall and floor tile from Mexico. Between 1989 and 1993, plaintiff entered more than 10,000 entries of imported merchandise and deposited estimated regular customs duties on each entry. Plaintiff deposited approximately $25 million in Customs duties between 1989 and 1993.

Upon liquidation of merchandise entered in 1989 and 1991, plaintiff protested the classification of hundreds of entries of imported merchandise. In response, Customs entered into settlement discussions with plaintiff. A contract of settlement was reached on December 13, 1994, after Customs indicated to plaintiff's attorney, Steven P. Kersner, Esq., precisely what form plaintiff's offer of settlement should take. Plaintiff's attorney was provided a copy of an internal Customs memorandum entitled "Dal-Tile Corp. – Structuring Offer in Compromise" which specifically delineated the language and terminology to be used by plaintiff's attorney in any offer to compromise or settle. (*See* Plaintiff's Motion for Summary Judgment (PSJ), Ex. A *attached to* Kersner Aff.) Pursuant to Customs's memorandum, the final and agreed[2] upon contract of settlement provided:

> The U.S. Customs Service shall *grant* Dal-Tile's protests concerning [the protested] entries to the extent that Dal-Tile shall receive refunds of *Customs duties deposited* in the amount of $8.0 million. The remaining protests filed by Dal-Tile concerning these entries shall be denied.

(PSJ, Ex. B (emphasis added).) The contract of settlement was silent as to the method by which Customs was to pay Dal-Tile the eight million dollar refund in "Customs duties deposited" and as to the issue of interest.

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[2] In accepting Dal-Tile's offer of settlement, defendant merely stated in a letter to Dal-Tile's attorney, "Please be advised that the U.S. Treasury accepts the offer in compromise from Dal-Tile Corporation on the terms stated in your letter of November 30 [1994]." (Plaintiff's Motion for Summary Judgment (PSJ), Ex. C.)

In order to pay plaintiff the amount due under the contract of settlement Customs utilized a method whereby Customs chose to reliquidate "nine representative entries"[3] (Addendum to Declaration of Ramona Q. McCarthy (Add. Decl. McCarthy) at 7,[4] *attached to* Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment and in Support of its Cross-Motion for Summary Judgment (DSJ)), from the numerous entries for which protests were granted pursuant to the contract of settlement. So that the nine "representative" entries would yield the eight million dollar refund upon reliquidation, Customs "modified [Customs's electronic records] for the nine entries[5] . . . to enable the system to issue upon reliquidation of these entries seven duty refund checks for $999,999, one for $900,000, and one for $100,007, for a total of $8 million, although these were not the amounts of duties [actually] deposited" on the nine "representative" entries.[6] (Declaration of Ramona Q. McCarthy (Decl. McCarthy) at ¶ 7, *attached to* Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment and in Support of its Cross-Motion for Summary Judgment.) The nine "representative" entries were reliquidated on January 6, 1995.

On March 27, 1995, Dal-Tile timely filed a protest contesting Customs's failure to pay interest on the duties refunded in connection with the nine reliquidated "representative" entries. Dal-Tile alleged Customs was required to pay interest on Dal-Tile's refund pursuant to 19 U.S.C.
§ 1505, as amended by the Customs Modernization Act of 1993 (Mod Act) requiring the payment of interest on refunds of excess duties deposited determined on liquidation or reliquidation.[7] Despite this change in the law, Customs denied the plaintiff's protests.

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[3] The Department of Treasury characterized the nine entries reliquidated by Customs as "representative" in an internal memorandum entitled "Reliquidation of Representative Entries for Protest Numbers 2304-92-0199932 and 2304-94-100148 [the protests covering the liquidated entries subject to the contract of settlement]." (Addendum to Declaration of Ramona Q. McCarthy (Add. Decl. McCarthy) at 7, *attached to* Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment and in Support of its Cross-Motion for Summary Judgment (DSJ)) The nine "representative" entries are Entry Nos.: 259-1877718-3; 259-1885939-5; 259-1886016-1; 259-1894767-9; 259-0019382-9; 259-0019431-4; 259-0020078-0; 259-0020336-2; and 259-0020430-3.

[4] The document cited is a memorandum dated December 22, 1994, to Sylvia Bird, a Supervisory Entry Officer, from Ramona McCarthy, a Field National Import Specialist.

[5] Prior to Customs modification of the electronic records for the nine "representative" entries, Customs's records indicated the following estimated regular Customs duties deposited on the respective entries: $1,829.81 deposited on Entry No. 259-1877718-3; $2,056.62 deposited on Entry No. 259-1885939-5; $2,074.94 deposited on Entry No. 259-1886016-1; $1,617.85 deposited on Entry No. 259-1894767-9; $2,106.72 deposited on Entry No. 259-0019382-9; $1,660.16 deposited on Entry No. 259-0019431-4; $1,975.03 deposited on Entry No. 259-0020078-0; $2,958.02 deposited on Entry No. 259-0020336-2; and $1,900.38 deposited on Entry No. 259-0020430-3. Prior to modification, the total amount deposited on the nine "representative" entries was $18,179.53.

[6] Customs represents the "entries were input for reliquidation on December 22, 1994, and were reliquidated on January 6, 1995." (Declaration of Ramona Q. McCarthy (Decl. McCarthy) at ¶ 7, *attached to* Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment and in Support of its Cross-Motion for Summary Judgment.) The Court notes in Dal-Tile's protest and complaint, Dal-Tile describes Customs's actions regarding the nine entries as a "liquidation," but in its motion for summary judgment, plaintiff describes Customs's actions as a "reliquidation." Defendant consistently refers to Customs's actions as a "reliquidation."

[7] In 1993, Congress enacted the Customs Modernization Act of 1993 (Mod Act) as part of the North American Free Trade Agreement Implementation Act. *See* Pub. L. No. 103-182, 107 Stat. 2057 (codified as amended in scattered sections of 19 U.S.C.). The changes provided by the Mod Act became effective on December 8, 1993. *See id.* at § 213, 107 Stat. 2057, 2099.

In December 1995, plaintiff timely filed this action. Plaintiff alleged, "[b]y refusing to pay interest on plaintiff's overpayment of duties deposited on the [nine (*see* Complaint at ¶ 2)] subject entries, which were [re]liquidated after the enactment of the [Mod Act], Customs violated 19 U.S.C. § 1505." (Complaint at ¶ 5.) In its answer defendant denied violating 19 U.S.C.
§ 1505. (Answer at ¶ 5.)

In July 1997, this Court stayed all proceedings in this case until a final decision was made by the Federal Circuit regarding the Mod Act's application to protests filed prior to, but acted upon by Customs after, the Mod Act's effective date.[8] In *Travenol Labs., Inc. v. United States*, 118 F.3d 749 (Fed. Cir. 1997), the Federal Circuit established a right to interest on all entries liquidated or reliquidated after the effective date of the Mod Act, regardless of whether the protests were filed prior to the Mod Act's effective date. *See id.* at 754. The Court vacated the stay in this matter in January of 1998.[9] Plaintiff now moves and defendant cross-moves for summary judgment on the question of interest under 19 U.S.C. § 1505.

CONTENTIONS OF THE PARTIES

A. *Plaintiff*

Plaintiff, Dal-Tile, contends no genuine issues of material fact exist, and it is entitled to judgment as a matter of law. Dal-Tile argues there is no dispute between the parties regarding Customs's obligation under 19 U.S.C. § 1505(c) to pay interest on refunds resulting from entries reliquidated in January 1995. According to Dal-Tile, "the sole issue remaining in dispute is the principal sum upon which interest must be paid." (PSJ at 9.) Dal-Tile submits by the plain meaning of the statute "interest must be paid on the actual amount of excess duties refunded, $8 million." (*Id.*)

Plaintiff contends the statute requires interest on "any excess monies refunded, not any excess monies deposited." (PSJ at 13 (emphasis omitted).) Because the refund was effectuated through reliquidations occurring in 1995 and the amount of the refund was eight million dollars, plaintiff argues the principal sum upon which interest is owed is eight million dollars. Dal-Tile contends the legislative history supports its understanding of the statute.[10]

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[8] Both parties admit plaintiff's original protests were filed prior to the effective date of the Mod Act. *See Dal-Tile Corp. v. United States*, 63 F. Supp. 2d 1341, 1345 n.7 (CIT 1999). The parties further admit the contract of settlement was entered into and the refund took place after December 8, 1993, the effective date of the Mod Act. *See id.*

[9] On March 19, 1999, defendant filed a motion for leave to file an amended answer and counterclaims. On September 2, 1999, defendant's motion was denied. *See Dal-Tile*, 63 F. Supp. 2d at 1350. In its cross-motion for summary judgment defendant notes it has not waived or abandoned its rights to the various affirmative defenses it brought to the Court's attention in its previous motion.

[10] While plaintiff cites to the *North American Free Trade Agreement Act*, JOINT REPORT OF CONGRESS, Pub. L. 103-189 § 642, at 90-91 (November 18, 1993), it appears plaintiff meant to cite either the *North American Free Trade Agreement Act*, S. REP. No. 103-189, 103rd Cong., 1st Sess. 1993, § 642, at 210 (1993), or the *North American Free Trade Agreement Act*, H. R. REP. No. 361(I), 103rd Cong., 1st Sess. 1993, § 642 at 327 (1993), *reprinted in*, 1993 U.S.C.C.A.N. 2552, 2690. Both reports can support the basic propositions plaintiff asserts when citing to the JOINT REPORT.

Plaintiff argues defendant's interpretation of the statute, that Dal-Tile's entitlement to interest is "limited to the interest on what the refund would have been if Customs, in reliquidating the nine entries which it selected to effectuate the $8 million refund, had refunded only the difference in [actual] duty on those nine entries," (PSJ at 9) is unsupported and contrary to the plain meaning of the law. Plaintiff asserts defendant's understanding of the statute would allow defendant to generate a "windfall for itself and to deprive plaintiff of substantial sums." (*Id.* at 12.) Plaintiff contends Customs unilaterally chose to effectuate the eight million dollar refund by reliquidating nine entries rather than the many entries originally protested by plaintiff. Customs acted, according to plaintiff, purely for its own administrative convenience. Plaintiff argues Customs should not be allowed to avoid, through a "self-serving . . . process," (Plaintiff's Reply Memorandum in Support of Its Motion for Summary Judgment and in Opposition to Defendant's Cross-Motion for Summary Judgment at 7) what it otherwise would have been required to pay if it had proceeded on an entry by entry reliquidation to reach the eight million dollar figure.

Finally, plaintiff contends defendant's arguments based on sovereign immunity are irrelevant. According to plaintiff, the statute clearly requires defendant to pay interest. When a statute requires the United States to pay interest, plaintiff argues, sovereign immunity is no defense.

Accordingly, plaintiff argues its motion for summary judgment should be granted.

B. *Defendant*

Defendant cross-moves for summary judgment arguing there are no genuine issues of material fact in this matter. Defendant argues Customs is obligated to pay interest under section 1505, "only on $18,179.53, which is the amount of refunded estimated regular customs duty deposited by Dal-Tile on the nine entries that were reliquidated." (DSJ at 4-5.)

Based on the plain meaning of the statute, defendant argues, before Customs is required to pay interest on duties refunded upon reliquidation of an "applicable entry," estimated duties must have been deposited on that entry by the importer of record. Defendant asserts the accrual period outlined in section 1505(c) supports this reading of the statute because, under section 1505(c), the only "applicable entr[ies]" on which interest accrues are those on which estimated duties were deposited and which were liquidated or reliquidated. Payment of interest is not provided, according to defendant, on refunds where an entry is not liquidated or reliquidated or where no duties were deposited on an entry. Defendant contends only the nine entries enumerated in plaintiff's protest are "applicable entr[ies]" because they were the only entries reliquidated. The remaining entries Dal-Tile protested were not reliquidated, and thus those entries

are not before the Court, and, they cannot be "applicable entr[ies]" within the meaning of section 1505(c).

Furthermore, while defendant does not contest plaintiff's understanding of Congress's intent, defendant contends the legislative history does not affect the Government's position.

Finally, defendant argues plaintiff's understanding of the statute is precluded by the Government's sovereign immunity. Citing to *Library of Congress v. Shaw*, 478 U.S. 310, 314, 318 (1986), defendant argues specific and express Congressional consent to an award of interest is required to permit an award of interest from the United States. Otherwise, the United States is immune from an interest award. Defendant contends this rule provides an added level of strictness to the general rule that waivers of sovereign immunity are construed strictly in favor of the sovereign. Defendant asserts Dal-Tile's arguments require a broad reading of the statute, in that plaintiff demands interest on excess moneys which were deposited on entries "that were not liquidated or reliquidated and are not before the Court." (DSJ at 13.) Because the express language of the statute does not unequivocally provide for interest on refunds of duties deposited on entries that were not liquidated or reliquidated, defendant argues, the principle of sovereign immunity should be applied and the statute strictly construed in favor of the government. Thus, "the Government's sovereign immunity to an interest award is waived here only for interest on $18,179.53, which is the amount of the duty refund attributable to the nine entries at issue." (DSJ at 13.)

Accordingly, defendant argues its cross-motion for summary judgment should be granted.

Standard of Review

Before the Court are plaintiff's motion and defendant's cross-motion for summary judgment. Summary judgment is appropriate if, based on the papers before the Court, "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." U.S. CIT R. 56(c). The issues before the Court are ones of statutory construction, a question of law, and may be decided on summary judgment.[11] *See Marathon Oil Co. v. United States*, 93 F. Supp. 2d 1277, 1279-80 (CIT 2000). Because the Court finds there are no material questions of fact summary judgment is appropriate.

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[11] Since the question before the court is a legal one, the statutory presumption of correctness afforded Customs, *see* 28 U.S.C. § 2639(a)(1) (1994), carries no force. *See Marathon Oil Co. v. United States*, 93 F. Supp. 2d 1277, 1279 (CIT 2000).

DISCUSSION

The legal issues before the Court pertain to whether Customs is obligated under 19 U.S.C. § 1505 to pay interest to plaintiff and, if so, the amount of principal upon which interest is owed.

In order to make its determination in this matter, the Court must first consider the language of the statute at issue. *Int'l Bus. Mach. Corp. v. United States*, 201 F.3d 1367, 1372 (Fed. Cir. 2000). If the Court finds the language "clear and unambiguous, then it controls, and we need not – indeed we may not – go further." *Id.* Section 1505 states, "The Customs Service shall . . . refund any excess moneys deposited, together with interest thereon, as determined on a liquidation or reliquidation" and further, "Interest on excess moneys deposited shall accrue . . . from the date the importer . . . deposits estimated duties, fees, and interest . . . ." 19 U.S.C. § 1505(b) and (c).

The Court finds the language of section 1505(b) plain and unambiguous. It is clear in order for Customs to be liable for interest, a refund must be "determined on a liquidation or reliquidation." Indeed, under the statute it is a liquidation or reliquidation which triggers interest liability. The Court notes this understanding of section 1505(b) is supported by the United States Court of Appeals for the Federal Circuit. *See Travenol*, 118 F.3d at 753 n.5 (stating the "event that gives rise to interest liability is liquidation or reliquidation"); *Novacor Chem. Inc. v. United States*, 171 F.3d 1376, 1382 (Fed. Cir. 1999) (reliquidation "is the triggering event in a dispute surrounding an award of interest"). Also, the Court notes defendant does not appear to disagree with this Court's interpretation of the statute. (DSJ at 7 (stating section 1505 (b) require[s] the refund be "'determined on a liquidation or a reliquidation,'" *see* 19 U.S.C. § 1505 (b), and citing *Travenol*, 118 F.3d at 753).)

In this case, as a result of the contract of settlement between Dal-Tile and government, Customs granted Dal-Tile's protests to the extent of refunding it eight million dollars. On December 22, 1993, Customs chose to reliquidate nine "representative" entries from those subject to the contract of settlement as the means by which Customs would refund the eight million dollars to plaintiff. After modifying the computer records for the nine "representative" entries, Customs reliquidated the nine "representative" entries on January 6, 1994, and refunded eight million dollars to Dal-Tile.

Based on the plain meaning of the statute, the Court finds Customs liable to plaintiff for interest under 19 U.S.C. § 1505. On reliquidation of the nine modified "representative" entries, Customs determined[12] to refund eight million dollars to Dal-Tile. Therefore, Customs is liable for interest under the statute.

As to the amount of principal upon which interest is owed, the plain language of section 1505(b) states interest shall be paid on a "refund [of] any excess moneys deposited" as determined on reliquidation. In this case, plaintiff argues the amount of "excess moneys deposited" upon which Customs owes interest is eight million dollars, and defendant argues the amount of "excess moneys deposited" upon which it owes interest is only $18,179.53, the amount of duties originally deposited on the nine "representative" reliquidated entries. Customs maintains the balance of the eight million dollars refunded to Dal-Tile does not constitute "excess moneys deposited" under section 1505(b) because it was deposited on entries that were not reliquidated.

First, the Court notes the parties appear to agree the eight million dollars refunded upon reliquidation to Dal-Tile constitutes excess moneys deposited on those entries for which Customs granted protests under the contract of settlement. The contract of settlement describes the eight million dollars to be refunded on the grant of Dal-Tile's protest as "Customs duties deposited." (PSJ, Ex. B.) Also, in papers submitted to this Court, the parties characterize the eight million dollars as excess moneys deposited. (*See* PSJ at 4 (describing the eight million dollars as "refunded excess duties"); DSJ at 8 (admitting the entirety of the refund, totaling eight million dollars, consisted of "excess moneys deposited"); Defendant's Response to Plaintiff's Statement of Material Facts Not In Dispute at ¶ 5 (admitting "defendant refunded $8 million in excess estimated regular customs duties to the plaintiff").) Therefore, the Court finds the eight million dollars refunded to Dal-Tile to be excess moneys deposited.

Defendant argues, however, the entire eight million dollars may not be considered "excess moneys deposited" under 19 U.S.C. § 1505(b) because the entirety of the eight million was not reliquidated as required by the statute. This Court disagrees with defendant's argument.

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[12] The Court notes the fact Customs was bound to the eight million dollar figure by entering into the contract of settlement is not relevant as to whether the determination to refund excess moneys deposited was made on reliquidation. The contract of settlement obligated Customs to grant Dal-Tile's protests to the extent of refunding it eight million dollars, and Customs chose to effectuate the grant by reliquidation. Because all decisions and findings by Customs are merged in and become part of the liquidation or reliquidation against which a protest will lie, *see United States v. Utex Int'l, Inc.*, 857 F.2d 1408, 1410 (Fed. Cir. 1988) (citations omitted); *Commonwealth Oil Refining Co., Inc. v. United States*, 332 F. Supp. 203, 209 (Cust. Ct. 1971); *Dow Chemical Co. v. United States*, 10 CIT 550, 557, 647 F. Supp. 1574,1581 (1986) (quoting *United States v. B. Holman, Inc.*, 29 CCPA 3, 14 (1941)), Customs's decision to grant Dal-Tile's protest and refund it eight million dollars became part of its determinations on reliquidation regarding the amount of excess moneys deposited. *Cf. Travenol*, 118 F.3d at 753 (reliquidation is when Customs "determine[s] whether there has been an overpayment or underpayment" of duties deposited).

The Court notes the language of the contract of settlement is unequivocal. Customs agreed to "grant Dal-Tile's protests . . . to the extent that Dal-Tile shall receive refunds of Customs duties deposited in the amount of $8.0 million." (PSJ, Ex. B.) While the Court recognizes the method by which Customs would generate the refund owed Dal-Tile was not specified in the contract of settlement, the Court notes the "grant" of a Customs protest triggers certain administrative action under the Customs statute and regulations. Pursuant to 19 U.S.C. § 1515(a) (1994): "[T]he appropriate customs officer, within two years from the date a protest was filed in accordance with 1514 of this title, shall review the protest and shall allow or deny such protest in whole or in part. Thereafter, any duties, charge, or exaction found to have been assessed or collected in excess shall be . . . refunded . . . ." Also, 19 C.F.R. § 174.29 (1994) requires, "[i]f a protest is allowed in whole or in part the district director shall remit or refund any duties . . . found to have been collected in excess . . . ." While the Court does not find any statutory or regulatory mandate for reliquidation if duties are to be refunded, the Court notes Customs jurisprudence tends to acknowledge "[t]he administrative mechanism for refunding duties is reliquidation of the entry." NEVILLE, PETERSON & WILLIAMS, CUSTOMS LAW & ADMINISTRATION § 9.3 (3d. ed. 1999). Therefore, any grant by Customs of Dal-Tile's protests arguably necessitated and, indeed, contemplated reliquidation of the numerous entries for which protests were granted.

The Court finds it clear that, in lieu of generating the refund owed Dal-Tile under the settlement agreement through an entry by entry reliquidation, Customs chose to reliquidate nine "representative" entries. Customs "modified" nine entries from those at issue in the contract of settlement to be "representative" of *all* those entries subject to Customs's grant of protest. The memorandum from Ramona Q. McCarthy to Sylvia Bird stated, in relevant part:

> We have been directed by the Department of the Treasury through Service Headquarters Office of Trade Operations to refund by December 31, 1994 Customs duties associated with the protested entries covered by the two subject protests. The total amount to be refunded equals $8,000,000. The instructions further indicate that we are to refund this amount either in a lump sum or in some other manner than on an entry by entry basis.

(Addendum to D McCarthy at 7.) Ms. McCarthy further declared:

> It was not possible to reliquidate a large number of entries within the time frame that was given [by the contract of settlement], and, with respect to considering making a lump sum payment, Customs' computer system prevents the refund of more money on an entry than was recorded as collected. Also, Customs cannot issue single duty refund checks for more than $999,999. Therefore, to effectuate the refund, other Customs personnel modified the [] records for the nine entries in this case to enable the sys-

> tem to issue upon reliquidation of these entries . . . a total of $8 million, although these were not the amounts of duties deposited . . . [*see supra* note 5].

(D McCarthy at ¶ 7.) In undertaking this method of refund, it is apparent Customs wholly disregarded the actual Customs duties deposited on the nine "representative" entries and utilized deposit figures for the nine "representative" entries which could result, upon reliquidation, in an eight million dollar refund. For example, Customs maintains only $2,106.72 was deposited on Entry No. 259-0019382-9; however, Customs's reliquidation worksheet indicates $999,999 was recorded deposited on the same entry and a refund check for $999,999 was issued to plaintiff on the same entry. By defendant's own admission, *i.e.*, "Customs' computer system prevents the refund of more money on an entry than was recorded as collected," it could not have generated the refund amount required given the deposits made on the nine "representative" entries at entry, *i.e.*, $18,179.53.

Defendant's argument that it is only liable for interest on those moneys actually deposited at entry on the nine "representative" reliquidated entries is unsupported by the undisputed facts evident in the documentation brought forth by defendant. Clearly, Customs considered there to be adequate moneys deposited on the nine "representative" entries to result in Dal-Tile's eight million dollar refund. Defendant's argument asks this Court to accept a mathematical impossibility, *i.e.*, that upon reliquidation $18,179.53 could yield an eight million dollar refund. This Court is unwilling to accept and endorse such an impossibility. This Court finds no reason for it to consider the nine "representative" entries, for the purpose of calculating interest, in a manner different from the manner in which Customs considered the nine "representative" entries for the purposes of reliquidation and refund, *i.e.*, as having excess moneys deposited in an amount to yield an eight million dollar refund.

Therefore, for the reasons stated above, this Court concludes, pursuant to 19 U.S.C. § 1505, *Travenol*, 118 F.3d at 749, and the undisputed facts, Dal Tile is entitled to receive interest on the refund of eight million dollars of excess moneys deposited in the manner required by law.

CONCLUSION

For the reasons stated above, the Court concludes plaintiff is entitled to interest pursuant to 19 U.S.C. § 1505. Accordingly, plaintiff's motion for summary judgment is granted and defendant's cross-motion for summary judgment is denied.

GREGORY W. CARMAN
Chief Judge

Dated: September 1, 2000
New York, New York

(Slip Op. 00-115)

DAL-TILE CORPORATION, PLAINTIFF, *v.* UNITED STATES, DEFENDANT

ORDER

This matter having been duly submitted for decision and this Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision, it is hereby

ORDERED that, pursuant to 19 U.S.C. § 1505 (1994), the United States Customs Service is directed to pay plaintiff interest on the eight million dollars of excess moneys deposited that were refunded in the manner required by law; and it is hereby further

ORDERED that judgement be, and hereby is, entered for plaintiff.

GREGORY W. CARMAN
Chief Judge

Dated: September 1, 2000
New York, New York

(Slip-Op. 00-116)

LEN-RON MANUFACTURING CO., INC., *ET AL.*, PLAINTIFFS, *v.* UNITES STATES, DEFENDANT.

Consol. Court No. 94-08-00488

Plaintiffs, Len-Ron Manufacturing Co., Inc., *et al.*, (Len-Ron) move for partial summary judgment pursuant to U.S. CIT R. 56(a), contending they are entitled to judgment as a matter of law because the United States Customs Service (Customs) improperly classified the merchandise at issue under subheading 4202.92.45, Harmonized Tariff Schedule of the United States (HTSUS), as "Other . . . With outer surface of sheeting of plastic . . . Travel, sports and similar bags . . . Other," dutiable at a rate of 20% *ad valorem*. Plaintiffs argue the imported merchandise is classified properly under subheading 4202.32.10, HTSUS, as "Articles of a kind normally carried in the pocket or in the handbag . . . With outer surface of sheeting of plastic . . . Of reinforced or laminated plastics," dutiable at a rate of 12.1¢/kg + 4.6% *ad valorem*.

Defendant, United States, opposes plaintiffs' motion. Pursuant to U.S. CIT R. 12(b)(1), defendant moves to dismiss for lack of jurisdiction under 28 U.S.C. § 1581(a) (1994) those entries included in the summons and complaint whose classification was not protested by plaintiffs pursuant to 19 U.S.C. § 1514 (1994). Defendant, also, cross-moves for partial summary judgment pursuant to U.S. CIT R. 56(b), contending it is entitled to judgment as a matter of law because the merchandise is classifiable under subheading 4202.12.20, HTSUS, as "[V]anity cases . . . With outer surface of plastics," dutiable at a rate of 20% *ad valorem*[1] and, in the alternative, affirm Customs's classification under subheading 4202.92.45, HTSUS. Plaintiffs oppose defendant's motions.

[1]On October 7, 1999, defendant amended its answer to plaintiffs' complaint adding an alternative classification under subheading 4202.12.20, Harmonized Tariff Schedule of the United States (HTSUS), "[V]anity cases . . . With outer surface of plastics."

Held: The Court finds there are no genuine issues of material fact and partial summary judgment is appropriate. The Court holds the merchandise at issue is classifiable under subheading 4202.12.20, HTSUS. Accordingly, plaintiffs' Motion for Partial Summary Judgment is denied, and defendant's Cross-Motion for Partial Summary Judgment is granted. The Court grants defendant's Motion to Dismiss in Part for Lack of Jurisdiction with respect to those entries subject to defendant's motion and to the classification cause of action only.

(Dated: September 1, 2000)

Soller, Shayne & Horn (*William C. Shayne* and *Margaret Hardy Sachter*, of Counsel), New York, New York, for plaintiffs.

David W. Ogden, Assistant Attorney General of the United States; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Mikki Graves Walser*); *Chi S. Choy*, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of Counsel, for defendant.

OPINION

CARMAN, *CHIEF JUDGE:* Plaintiffs, Len-Ron Manufacturing Co., Inc., *et al.*, (Len-Ron) move for partial summary judgment pursuant to U.S. CIT R. 56(a), contending they are entitled to judgment as a matter of law because the United States Customs Service (Customs) improperly classified the merchandise at issue under subheading 4202.92.45, Harmonized Tariff Schedule of the United States (HTSUS), as "Other . . . With outer surface of sheeting of plastic . . . Travel, sports and similar bags . . . Other," dutiable at a rate of 20% *ad valorem*.[2] Plaintiffs argue[3] the imported merchandise is classified properly under subheading 4202.32.10, HTSUS, as "Articles of a kind normally carried in the pocket or in the handbag . . . With outer surface of sheeting of plastic . . . Of reinforced or laminated plastics," dutiable at a rate of 12.1¢/kg + 4.6% *ad valorem*.[4]

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[2]Subheading 4202.92.45, HTSUS, in relevant part, states:

4202	Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber, or of paperboard, or wholly or mainly covered with such materials or with paper:	
	* * *	
	Other:	
	* * *	
4202.92	With outer surface of sheeting of plastic or of textile materials:	
	Travel, sports and similar bags:	
	* * *	
4202.92.45	Other	20%

[3]The Court notes plaintiffs abandon the alternative classification proposed in their complaint for the merchandise at issue. (*See* Memorandum of Law in Support of Plaintiffs' Opposition to Defendant's Motion to Dismiss this Action as to Certain Entries and in Support of Plaintiffs' Response to Defendant's Cross-Motion for Partial Summary Judgment (Plaintiffs' Response) at 4-5 ("Plaintiffs are abandoning their alternate claim that these cosmetic bags are classifiable as articles of sheeting of plastic under 3926.90.90 HTSUS.").)

[4]Subheading 4202.32.10, HTSUS, in relevant part, states:

	Articles of a kind normally carried in the pocket or in the handbag:	
	* * *	
4202.32	With outer surface of sheeting of plastic or of textile materials:	
	With outer surface of sheeting of plastic:	
4202.32.10	Of reinforced or laminated plastics	12.1¢/kg + 4.6%

Defendant, United States, opposes plaintiffs' motion. Pursuant to U.S. CIT R. 12(b)(1), defendant moves to dismiss in part for lack of jurisdiction under 28 U.S.C. § 1581(a) (1994) those entries included in the Summons and Complaint whose classification was not protested by plaintiffs pursuant to 19 U.S.C. § 1514 (1994)[5]. Defendant, also, cross-moves for partial summary judgment pursuant to U.S. CIT R. 56(b)[6], contending it is entitled to judgment as a matter of law because the merchandise is classifiable properly under subheading 4202.12.20, HTSUS, as "[V]anity cases . . . With outer surface of plastics," dutiable at a rate of 20% *ad valorem*[7] and, in the alternative, under subheading 4202.92.45, HTSUS. Plaintiffs oppose defendant's motions. This Court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1994).

I. BACKGROUND

Plaintiffs are manufacturers and distributors of cosmetics. The complaints in this consolidated action[8] raise two independent causes of action. The first cause of action contests Customs's classification of the merchandise at issue under subheading 4202.92.45, HTSUS, as "Other . . . With outer surface of sheeting of plastic . . . Travel, sports and similar bags . . . Other," dutiable at a rate of 20% *ad valorem*. The second cause of action contests Customs's appraisement decisions with

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[5]19 U.S.C. § 1514(a) (1994) states, in relevant part:

> Except as provided in subsection (b) of this section . . . decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to –
>
> * * *
>
> (2) the classification and rate and amount of duties chargeable;
>
> * * *
>
> shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section . . . .

[6]The Court notes plaintiffs and defendant simultaneously filed their respective motions for partial summary judgment on March 20, 2000.

[7]Subheading 4202.12.20, HTSUS, in relevant part, states:

> Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels and similar containers:
>
> * * *
>
> 4202.12 With outer surface of plastics or of textile materials:
> 4202.12.20 With outer surface of plastics:20%
>
> * * *
>
> Other:
>
> Trunks, suitcases, vanity cases and similar containers

[8]The eight causes of action consolidated under Court No. 94-08-00488 pursuant to U.S. CIT R. 42(a) include Court Nos.: 94-08-00488; 94-09-00550; 96-02-00600; 96-02-00601; 96-03-00753; 96-08-01946; 97-02-00223 and 97-02-00224. The motion to consolidate this action was granted July 25, 1997. The Court notes no consolidated complaint was filed by the parties in this consolidated action.
8; 456-0296428-5; 456-0297000-1; 456-0297173-6; 456-0297225-4; 456-0297327-8; 456-0297880-6. (*See* Defendant's Statement of Facts at ¶ 4; Plaintiffs' Response to Defendant's Facts (no objection to defendant's statements in ¶ 4).)

regard to certain entries. Of the entries at issue in this action, plaintiffs contest the classification of thirty-nine entries. However, there are twenty-three other entries in which plaintiffs only contest the appraisement decisions made by Customs.[9] Those twenty-three entries are not reached by this opinion.

The merchandise at issue consists of variously shaped cosmetics bags,[10] articles of which have been invoiced by plaintiffs as "rectangular bag, halfmoon bag, fabric bag, travel bag, PVC sponge bag, reusable bag, cosmetic case, cosmetic bag, GWP sunnysider, hatbox U.S.A. bag, new stone open bag, horizontal tote, fabric mirror pouch, nylon cosmetic bag, generic bag, nylon drawstring bag, and cosmetic pouch." (Memorandum in Support of Defendant's Motion to Dismiss in Part and Defendant's Cross-Motion for Partial Summary Judgment (Defendant's Motion) at 1-2.) Made with an outer surface of polyvinyl chloride (PVC) and an inner lining of polyvinyl sheathing,[11] the cosmetics bags are supple, non-rigid and not supported by frames.

Plaintiffs import the merchandise at issue for use as promotional items to be presented to customers upon the purchase of a certain amount of plaintiffs' cosmetic and toiletry products, either as a free premium or at a nominal additional cost. Articles of merchandise are used to contain, organize and segregate cosmetic and toiletry products and some are small enough to be housed[12] within a handbag.[13]

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[9]The entries for which plaintiffs contest classification are: Entry Nos. 456-2933533-5; 456-0293604-4; 456-0293536-8; 456-0293788-5; 456-0293709-1; 456-0293710-9; 456-0293736-4; 456-0293884-4; 456-0293701-8; 456-0294150-7; 456-0294015-2; 456-0293910-5; 456-0293900-6; 456-0293871-9; 456-0293795-0; 456-0094275-4; 456-0293833-9; 456-0294016-0; 456-0294267-9; 456-0294293-5; 456-0294317-2; 456-0295560-6; 456-0295661-2; 456-0295671-1; 456-0295741 2; 456-0295848-5; 456-0296169-5; 456-0296233-9; 456-0296295-8; 331-9282601-5; 456-0297226-2; 482-0822147-2; 906-1101960-6; 456-0297495-3; 456-0297850-9; 456-0297804-6; 456-0298032-3; 456-0298074-5; 456-0298116-4. (*See* Defendant's Statement of Material Facts As to Which There is No Genuine Issue to be Tried (Defendant's Statement of Facts) at ¶ 3; Plaintiffs' Objection to Defendant's Statement of Material Facts as to Which There is No Genuine Issue to be Tried (Plaintiffs' Response to Defendant's Facts) (no objection to defendant's statements in ¶ 3).)

The entries for which plaintiffs did not protest classification are: Entry Nos. 456-0002945-5; 456-0295872-5; 456-0295908-7; 456-0296044-0; 456-0295722-2; 456-0003076-6; 456-0003105-3; 456-0296239-6; 456-0296113-3; 456-0296155-4; 456-0296167-9; 456-0296191-9; 456-0296192-7; 456-0296216-4; 456-0296424-4; 456-0296428-5; 456-0296403-8; 456-0296428-5; 456-0297000-1; 456-0297173-6; 456-0297225-4; 456-0297327-8; 456-0297880-6. (*See* Defendant's Statement of Facts at ¶ 4; Plaintiffs' Response to Defendant's Facts (no objection to defendant's statements in ¶ 4).)

[10]The Court notes plaintiffs refer to the merchandise at issue as "cosmetic bags," (*see* Plaintiffs' Statement Under Rule 56(i) of Material Facts as to which There is No Dispute at ¶ 1 (Plaintiffs' Statement of Facts)); however, throughout the opinion the Court will refer to the merchandise at issue as "cosmetics bags" for the purposes of this opinion. The Court finds the terms to be synonymous.

[11]The Court notes all the proposed classifications at issue in this matter may require the merchandise at issue to have a plastic component in order for classification to be proper. *See* heading 4202, HTSUS ("[O]f sheeting of plastics"); subheading 4202.12.20 ("With outer surface of plastics"), subheading 4202.32.10 ("With outer surface of sheeting of plastic . . . Of reinforced or laminated plastics"), subheading 4202.92.45, HTSUS ("With outer surface of sheeting of plastic"). Because this element of classification has been stipulated to by the parties and the Court finds its understanding of the tariff phrase comports with that stipulation, the Court, in its discussion, will refer only to the contested subheadings and phrases, namely subheadings 4202.12, HTSUS, "[V]anity cases," 4202.32, HTSUS, "Articles of a kind normally carried in the pocket or the handbag," and 4202.92.45, HTSUS, "Other . . . Travel, sports and similar bags . . . Other."

[12]*See infra* note 34.

[13]The parties admit women normally carry a handbag containing various personal items wanted about their person for convenience. (*See* Plaintiffs' Statement of Facts at ¶ 8; Defendant's Response to Plaintiffs' Statement under Rule 56(i) of Material Facts as to Which There is no Dispute (Defendant's Response to Plaintiffs' Facts) at ¶ 8.)

II. CONTENTIONS OF THE PARTIES

A. *Plaintiffs*

1. *Plaintiffs' Opposition to Defendant's Motion to Dismiss in Part*

Plaintiffs oppose defendant's motion to dismiss for lack of jurisdiction certain entries for which plaintiffs did not protest classification. Plaintiffs argue defendant's motion is premature, irrelevant to the cross-motions for summary judgment before the Court, and the Court should deny the motion with leave for defendant to renew.

Even though plaintiffs admit no protests regarding classification were filed for the twenty-three entries for which defendant seeks dismissal, plaintiffs contend the Court should proceed to determine the proper classification of the merchandise without dismissing the classification claims with respect to those twenty-three entries. Plaintiffs argue the cross-motions for partial summary judgment before the Court involve a legal question concerning the scope and meaning of three tariff provisions, and the Court's judgment in no way depends upon how many or which entries will be affected. Plaintiffs maintain determination of the entries affected by the Court's judgment is largely a clerical task to be undertaken when the Court's judgment is executed. At that point, plaintiffs propose, defendant should be allowed to renew its motion to dismiss certain entries, or the parties may stipulate to a list of entries to which the judgment applies.

2. *Plaintiffs' Motion for Partial Summary Judgment*

Plaintiffs contend no genuine issues of material fact exist, and they are entitled to judgment as a matter of law. Len-Ron argues Customs improperly classified the cosmetics bags under subheading 4202.92.45, HTSUS, as "Other . . . Travel, sports and similar bags . . . Other," dutiable at a rate of 20% *ad valorem*. Plaintiffs also assert defendant's proposed alternative classification for the merchandise at issue under subheading 4202.12.20, HTSUS, as "[V]anity cases," dutiable at a rate of 20% *ad valorem*, is incorrect. Len-Ron contends the merchandise at issue is classified properly under subheading 4202.32.10, HTSUS, as "Articles of a kind normally carried in the pocket or in the handbag," dutiable at a rate of 12.1¢/kg + 4.6% *ad valorem*.

a. *Proper Classification of the Merchandise at Issue under Subheading 4202.32, HTSUS, as "Articles of a kind normally carried in the pocket or in the handbag."*

Plaintiffs argue the cosmetics bags at issue are normally carried by women in a handbag to hold, segregate and protect cosmetics. A cosmetics bag, plaintiffs argue, is similar to other personal articles, *e.g.*, wallet, change purse, organizer, women normally carry in their handbags for daily use. Plaintiffs maintain the cosmetics bags at issue are not carried normally as a separate bag or container. Therefore, plaintiffs argue subheading 4202.32, HTSUS, "Articles of a kind normally carried in the pocket or in the handbag" encompasses the

merchandise at issue.

Plaintiffs also argue legislative history supports classification of the cosmetics bags under subheading 4202.32, HTSUS. Len-Ron contends analysis of the statute establishes subheading 4202.32, HTSUS, as a use provision. Plaintiffs maintain legislative history supports a use-based interpretation of the statute rather than one based solely on the exemplars listed in the statute and Explanatory Notes for Chapter 42.02, HTSUS.[14] According to plaintiffs, the Harmonized System Committee (HSC) of the Customs Cooperation Council's use of the phrase "Articles of a kind normally carried in the pocket or in the handbag," instead of the exemplar-based Tariff Schedule of the United States (TSUS) provision for "flat goods,"[15] illustrates the HSC's intention for the subheading to cover a broad base of similar articles characterized by their use as containers for articles carried on the person. Plaintiffs maintain the subheading 4202.32, HTSUS, is not limited, by it own terms or by the intent of the drafters, to the specific articles enumerated in heading 4202, *i.e.*, wallets, purses, map cases, cigarette cases, similar containers, or in the Explanatory Notes for Chapter 42.02, HTSUS, *i.e.*, "similar containers" in second part of heading 4202, HTSUS, as including note-cases, writing cases, pen-cases, ticket-cases, cigar-cases, etc.[16] Plaintiffs maintain, the Explanatory Note clearly shows this heading continues to include flat goods; however, unlike the subheading used in the TSUS, subheading 4202.32, HTSUS, will be governed by use, not exemplars. Therefore, plaintiffs argue, since the merchandise at issue is to be used or carried within a handbag, it squarely falls under subheading 4202.32, HTSUS, "Articles of a kind normally carried in the pocket or in the handbag."

Also, plaintiffs argue, while the exemplars in the statute and Explanatory Notes may not be used as limitations for classification under heading 4202.32, they are relevant for determining the essential characteristics, under the *ejusdem generis* rule of statutory construction,[17] of items classifiable within subheading 4202.32, HTSUS. Plaintiffs assert the cosmetics bags at issue share the

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[14]The Explanatory Notes are the official interpretation of the scope of the Harmonized Commodity Description and Coding System (which served as the basis of the HTSUS) as viewed by the Customs Cooperation Council (CCC), the international organization that drafted the international nomenclature. *See E.M. Chemicals v. United States*, 923 F. Supp. 202, 207 n.6 (CIT 1996).

[15]The Tariff Schedule of the United States (TSUS), schedule 7, part 1, subpart D, Headnote 2(c) (1986), provided that the term "flat goods" covered:

> small flatwares designed to be carried on the person, such as banknote cases, bill cases, billfolds, bill purses, bill rolls, card cases, change purses, cigarette cases, coin purses, coin holders, compacts, currency cases, key cases, letter cases, license cases, money cases, pass cases, passport cases, powder cases, spectacle cases, stamp cases, vanity cases, tobacco pouches, and similar articles.

[16]The Court notes the Explanatory Notes for Chapter 42.02 state, in relevant part: "[Subheadings 4202.31, 4202.32, and 4202.39] cover articles of a kind normally carried in the pocket or in the handbag and include spectacle cases, note-cases (bill-folds), wallets, purses, key- cases, cigarette-cases, cigar-cases, pipe-cases and tobacco-pouches."

[17]*Ejusdem generis*, which means "of the same kind," is a rule of statutory construction providing:

> where an enumeration of specific things is followed by a general word or phrase, the general word or phrase is held to refer to things of the same kind as those specified. As applicable to classification cases, *ejusdem generis* requires that the imported merchandise possess the essential characteristics or purposes that unite the articles enumerated *eo nomine* in order to be classified under the general terms.

Sports Graphics, Inc. v. United States, 24 F.3d 1390, 1392 (Fed. Cir. 1994) (citations omitted).

essential characteristics of the exemplars enumerated in the statute and Explanatory Notes. Like the exemplars, the merchandise at issue is small, lightly constructed and designed to be carried in a handbag and is normally so carried. Therefore, the merchandise at issue is properly classifiable under subheading 4202.32, HTSUS, as "Articles of a kind normally carried in the pocket or in the handbag."

b. *Improper Classification of the Merchandise at Issue under Subheading 4202.92.45, HTSUS, as "Other . . . Travel, sports and similar bags . . . Other."*

Plaintiffs argue the merchandise at issue is not classifiable under subheading 4202.92.45, HTSUS, as "Other . . . With outer surface of sheeting of plastic . . . Travel, sports and similar bags . . . Other," dutiable at a rate of 20% *ad valorem*. First, plaintiffs contend Customs improperly classified the merchandise at issue within a residuary subheading without determining first whether the article was classifiable within any of the other available subheadings. Plaintiffs maintain the merchandise at issue is *prima facie* classifiable under subheading 4202.32, HTSUS. Without refutation of this classification, plaintiffs argue, Customs's classification of the cosmetics bags under the residuary subheading in Chapter 42, HTSUS, "Other" is improper. Moreover, plaintiffs contend Additional U.S. Note 1 (U.S. Note 1)[18] requires Customs to exclude the merchandise at issue from classification under subheading 4202.32, HTSUS, prior to using subheading 4202.92, HTSUS, "Other."

Second, plaintiffs contend Customs's classification under subheading 4202.92, HTSUS, "Other" is contrary to the classification methodology set forth by the General Rules of Interpretation (GRI). GRI 6[19] instructs comparisons be made only between tariff provisions at the same level of the tariff hierarchy. Len-Ron argues Customs's rationale for classification under subheading 4202.92, HTSUS, is based upon a comparison of two provisions that are not comparable, "Articles of a kind normally carried in the pocket or in the handbag," a subheading and "Travel, sports and similar bags," a subordinate division of the subheading "Other." Plaintiffs argue Customs's interpretation and analysis of the merchandise at issue under the HTSUS is erroneous.

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[18]Chapter 42, Additional U.S. Note 1 (U.S. Note 1) states, in relevant part:

> For the purposes of heading 4202, the expression "*travel, sports and similar bags*" means goods, other than those falling in subheadings 4202.11 through 4202.39, of a kind designed for carrying clothing and other personal effects during travel, including backpacks and shopping bags of this heading . . . .

[19]General Rule of Interpretation (GRI) 6 states:

> For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable.

Plaintiffs further argue, even if the merchandise at issue is *prima facie* classifiable under subheading 4202.32, HTSUS, and subheading 4202.92, HTSUS, GRI 3(a)[20] would mandate classification under subheading 4202.32, HTSUS, because it offers "the most specific description" of the merchandise at issue. Moreover, even if the subheading 4202.32, HTSUS, could be compared with subheading 4202.92.45, HTSUS, "Other . . . Travel, sports and similar bags . . . Other," plaintiffs contend, subheading 4202.32, HTSUS, would still be the proper classification because the merchandise at issue does not share essential characteristics with the exemplars enumerated under subheading 4202.92.45, HTSUS. Citing U.S. Note 1 to Chapter 42 of the HTSUS, plaintiffs maintain, unlike travel, sports and similar bags, the merchandise at issue is not designed to carry clothing and other personal effects during travel. Also, plaintiffs argue the merchandise at issue is not designed to be carried independently but within another container. Therefore, plaintiffs assert the merchandise at issue may not be properly classified under subheading 4202.92.45, as "Other . . . Travel, sports and similar bags . . . Other."

c. *Improper Classification under Subheading 4202.12.20, HTSUS, "[V]anity cases."*

Plaintiffs argue the cosmetics bags may not be classified properly under the *eo nomine*[21] tariff term "[V]anity cases" in subheading 4202.12, HTSUS.

First, plaintiffs contend the term "[V]anity cases" is ambiguous and dictionary definitions of the term and expert testimony reveal three distinct forms of the article: a compact, a handbag and a small piece of luggage. Plaintiffs maintain the statute refers to the third definition, a small piece of luggage. Plaintiffs base their argument on the drafting history of the Harmonized Tariff Schedule (HTS). Len-Ron notes the HTS is a multi-national tariff with international nomenclature, and the meaning of a term must be construed in the context of the various languages in which the HTS is written. According to plaintiffs, under the international nomenclature, HTS headings and subheadings should encompass the same items despite language differences. Plaintiffs contend the first part of the heading 4202, *i.e.*, "Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers . . . ," which includes the term "vanity cases," was intended to include

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[20]GRI 3(a) states, in pertinent part:

> When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:
>
> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description.

[21]An *eo nomine* designation is one which describes a "commodity by a specific name, usually one well known to commerce." *United States v. Bruckmann*, 582 F.2d 622, 625 n.8 (CCPA 1978).

items of luggage. Comparing the English and French terminology under heading 4202, HTSUS, plaintiffs maintain the term "vanity cases" was intended by the drafters to be equivalent to the French term "les mallettes de toilettes," *i.e.*, little trunks for toilet articles. According to plaintiffs, the merchandise at issue does not meet this definition.

In addition, plaintiffs argue, under the rule of *ejusdem generis*, the cosmetics bags do not share essential characteristics with the containers listed in the first part of heading 4202 or in subheadings 4202.12, HTSUS, "Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels and similar containers [*e.g.*, hat boxes, camera accessory cases, cartridge pouches, sheaths for hunting or camping knives . . . . *See* Ch. 42.02, Explanatory Notes]." Plaintiffs maintain all the exemplars are designed to be carried independently as external bags, unlike the merchandise at issue. Therefore, plaintiffs contend the *eo nomine* provision of "vanity cases" under which defendant would classify the cosmetics bags has been shown by definition, legislative history and similitude to be limited to the type of vanity case that resembles a small suitcase for cosmetics. Therefore, plaintiffs argue the merchandise at issue may not be classified properly under subheading 4202.12, HTSUS, as "[V]anity cases."

For all the reasons cited above, plaintiffs assert the proper classification of the merchandise at issue is under subheading 4202.32, HTSUS, as "Articles of a kind normally carried in the pocket or in the handbag."

B. *Defendant*

1. *Defendant's Motion to Dismiss in Part*

Pursuant to U.S. CIT R. 12(b), defendant, United States, moves to dismiss the twenty-three entries for which classification was not protested. Defendant argues it is fundamental that in order for the Court to have jurisdiction under 28 U.S.C. § 1581(a) over the twenty-three entries at issue in this motion, it was necessary for plaintiffs to have protested Customs's classification for each entry pursuant to 19 U.S.C. §§ 1514 and 1515. The government contends because plaintiffs did not protest the classification of the twenty-three entries it seeks to dismiss, the Court may not properly exercise jurisdiction over those entries. Accordingly, defendant moves for dismissal with respect to those twenty-three entries.

2. *Defendant's Cross-Motion for Summary Judgment*

Defendant argues there are no issues of material fact, and it is entitled to judgment as a matter of law. Defendant contends the cosmetics bags at issue should be classified under subheading 4202.12, HTSUS, "[V]anity cases," and, in the alternative, under subheading 4202.92.45, HTSUS, "Other . . . Travel, sports and similar bags . . . Other." Defendant maintains the cosmetics bags are not classifiable

properly under subheading 4202.32, HTSUS, "Articles of a kind normally carried in the pocket or in the handbag."

a. *Proper Classification of the Merchandise at Issue under Subheading 4202.12, HTSUS, "[V]anity cases."*

Defendant argues the cosmetics bags should be classified under subheading 4202.12, HTSUS, an *eo nomine* provision for "vanity cases." Finding the term ambiguous, defendant acknowledges the common dictionary meaning of the term "vanity case" includes several forms of the article, *e.g.*, a small luggage bag for holding cosmetics, small container to carry cosmetic accessories. Even so, defendant argues Congress is presumed to know the language of commerce so as to classify commodities according to the general usage and denomination of the trade; therefore, in the absence of legislative intent, an *eo nomine* provision includes all forms of an article. Defendant contends the merchandise at issue fits squarely within the common meaning of the term "vanity cases" as used in the HTSUS. Defendant asserts a vanity case is a small handbag or case for carrying cosmetics. Customs notes plaintiffs refer to the merchandise at issue as cosmetics cases, defined as a small piece of luggage for cosmetics. Based on the similarity of their definitions, defendant argues a cosmetic case is a vanity case. Therefore, the merchandise at issue may be classified properly under subheading 4202.12, HTSUS, as "[V]anity cases."

Defendant also argues plaintiffs may not argue under the rule of *ejusdem generis* to refute classification of the cosmetics bags under subheading 4202.12, HTSUS. Defendant contends since the merchandise at issue falls squarely within the common meaning of the term "[V]anity case[ ]" in the subheading, *ejusdem generis* may not be used to restrict the scope of the provision. Defendant contends the common meaning of the term "vanity case" is clear. Therefore, rules of construction such as *ejusdem generis* may not be used to narrow the term's common meaning.

Even so, defendant contends, if the rule of *ejusdem generis* applies and the term "vanity cases," in fact, only applies to luggage, the cosmetics bags would still be classifiable under subheading 4202.12, HTSUS, as "similar containers." Defendant argues all the articles enumerated in subheading 4202.12, HTSUS, are traveling bags used to carry different types of articles. Since the rule of *ejusdem generis* requires only that the merchandise possess the essential character running through all enumerated exemplars, defendant maintains the merchandise at issue is *ejusdem generis* because it is a travel bag used to carry cosmetics. Defendant contends plaintiffs' argument using *ejusdem generis* has no merit.

b. *Proper Classification of the Merchandise at Issue under Subheading 4202.92.45, HTSUS, as "Other . . . Travel, sports and similar bags . . . Other."*

Alternatively, Customs argues the cosmetics bags were classified properly upon entry under subheading 4202.92.45, HTSUS, as "Other . . .Travel, sports and similar bags . . . Other." Defendant maintains, contrary to plaintiffs' assertions, it classified the merchandise under the residuary subheading 4202.92, HTSUS, by relying upon the plain meaning of the statute and not upon a comparison between subheading 4202.32, HTSUS, "Articles of a kind normally carried in the pocket or in the handbag" and subheading 4202.92, HTSUS, "Other." According to Customs, the cosmetics bags are not classifiable under subheading 4202.32, HTSUS; therefore, Customs's choice of the residuary subheading was appropriate.

According to Customs, the cosmetics bags fall under the statutory definition of "[t]ravel, sports and similar bags" as provided by Chapter 42, Additional U.S. Note 1, HTSUS, "goods . . . of a kind designed for carrying clothing and other personal effects during travel." Defendant argues plaintiffs refer to the merchandise at issue as travel bags, cases and pouches in marketing and advertising literature and, according to plaintiffs, the merchandise is designed to carry personal effects such as cosmetics. Accordingly, contends defendant, the cosmetics bags meet the statutory definition of "Travel, sports and similar bags" and therefore, it was classified properly under subheading 4202.92.45, HTSUS, as "Other . . . Travel, sports and similar bags . . . Other."

c. *Improper Classification under Subheading 4202.32, HTSUS, "Articles of a kind normally carried in the pocket or in the handbag."*

Customs argues the language of subheading 4202.32, HTSUS, is plain and unambiguous, and the merchandise at issue may not be classified properly under the subheading. Customs contends the statutory phrase "Articles of a kind normally carried in the pocket or in the handbag," was intended by Congress to refer only to small pocket articles. To bolster its argument, Customs cites the exemplars enumerated in the Explanatory Notes as "Articles of a kind normally carried in the pocket or in the handbag," *i.e.*, spectacle cases, note-cases (bill-folds), wallets, purses, key-cases, cigarette-cases, cigar-cases, pipe-cases and tobacco-pouches. Defendant claims the fact all these items may be carried in the pocket as well as in the handbag illustrates subheading 4202.32, HTSUS, was only meant to include items which are capable of being carried in a pocket. Therefore, argues Customs, this size limitation precludes classification of the merchandise at issue under subheading 4202.32, HTSUS, because the cosmetics bags are not small pocket articles.

In addition, defendant uses HTS drafting history to support the validity of its conclusion that the plain meaning of subheading 4202.32, HTSUS, only implicates small pocket articles. Customs argues, in

1978, the United States Administration proposed to the HSC an additional subheading for "flat goods" in heading 4202 which the United States' delegate explained was intended to give separate status to small pocket articles. According to defendant, the HSC agreed with the United States about the need for an additional subheading but in lieu of the phrase "flat goods" chose the phrase "Articles of a kind normally carried in the pocket or in the handbag." Defendant contends the phrase used in subheading 4202.32, HTSUS, was borrowed from Chapter 71 of the HTSUS and its Explanatory Notes classifying articles of jewelry, all of which may be carried in the pocket.[22] Also, defendant notes similar language was in use in the TSUS to define articles of jewelry, and a variation of this language was used to define "flat goods." Defendant contends since the HSC essentially adopted the United States "flat goods" proposal in the Explanatory Notes, although under a different title, and since, according to the U.S. delegate, the "flat goods" provision was intended to include only small pocket articles, subheading 4202.32, HTSUS, "Articles of a kind normally carried in the pocket or in the handbag" was intended only to cover small pocket articles.

In addition, defendant contends when Congress recast the TSUS "flat goods" provision in the Explanatory Notes, as "Articles of a kind normally carried in the pocket or in the handbag," it removed the term "vanity cases" from the exemplars that had been enumerated in the TSUS provision. According to Customs, the regrouping of "vanity cases" in an alternative subheading 4202.12, HTSUS, limited the scope of subheading 4202.32, HTSUS, to small pocket articles. By changing the language of the recast flat goods provision to include only articles of a kind normally carried in the pocket or in the handbag and providing for vanity cases in a separate provision, Congress manifested an obvious intent to treat vanity cases separately and distinctly from those articles with which they had been grouped under the TSUS. Therefore, the merchandise at issue is not classifiable under subheading 4202.32, HTSUS, as "Articles of a kind normally carried in the pocket or in the handbag."

Customs also argues plaintiffs failed to demonstrate the cosmetics bags are "of a kind" normally carried in the pocket or in the handbag as required by the plain meaning of the statute. Customs notes classification within headings and subheadings using the phrase "of a kind" is controlled by use. Pursuant to the instruction of Additional U.S. Rule of Interpretation 1(a), HTSUS,[23] defendant contends the cosmetics bags are not of the "class or kind" of goods described in

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[22]Chapter 71, Note 8(b), HTSUS, provides:

> (b) Articles of personal use of a kind normally carried in the pocket, in the handbag or on the person (such as cigarette cases, powder boxes, chain purses or pill boxes.

[23]Additional U.S. Rule of Interpretation 1(a), HTSUS, provides, in pertinent part:

> (a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that *class or kind* to which the imported goods belong, and the controlling use is the principal use . . . .

(Emphasis added).

subheading 4202.32, HTSUS, as "Articles of a kind normally carried in the pocket or in the handbag" because the merchandise at issue is not commercially fungible[24] with those items which define the class or kind of articles covered by subheading 4202.32, HTSUS. According to defendant, plaintiffs have produced no evidence of commercial fungibility. Defendant maintains, under the plain meaning subheading 4202.32, HTSUS, the cosmetics bags may not be classified properly as "Articles of a kind normally carried in the pocket or in the handbag."

For all these reasons, defendant argues the proper classification for the merchandise at issue is subheading 4202.12, HTSUS, "[V]anity cases."

III. Motion to Dismiss in Part for Lack of Jurisdiction

When a defendant challenges the Court's jurisdiction, the plaintiff has the burden of demonstrating jurisdiction exists. *See Lowa, Ltd. v. United States*, 561 F. Supp. 441, 443 (CIT 1983).

Pursuant to 28 U.S.C. § 1581(a), this Court has "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930 [the Act]." Codified at 19 U.S.C. § 1515(a) (1994), section 515(a) of the Act provides, "the appropriate customs officer, within two years from the date a protest was filed in accordance with section 1514 of this title, shall review the protest and shall allow or deny such protest in whole or in part." Section 1514(a) states decisions of the Customs Service including "the classification and rate and amount of duties chargeable . . . shall be final and conclusive upon all persons . . . unless a protest is filed in accordance with this section." 19 U.S.C. § 1514(a).

Plaintiffs do not dispute their failure to file protests regarding the classification of the twenty-three entries at issue in defendant's motion to dismiss in part for lack of jurisdiction. Therefore, because no protests were filed, the classification of the twenty-three entries at issue is final and conclusive. *See United States v. Ataka Am., Inc.*, 826 F. Supp. 495, 502 (CIT 1993) ("Failure to protest [classification] results in the finality of the decision."). Accordingly, the Court finds it lacks jurisdiction under 28 U.S.C. § 1581(a) over those non-protested entries and grants defendant's motion dismissing the twenty-three entries at issue with respect to the classification cause of action. *See Computime, Inc. v. United States*, 601 F. Supp. 1029, 1031 (CIT 1984). This Court makes no determination as to how the twenty-three entries may be considered in the appraisement cause of action.[25]

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[24]Defendant cites the United States Court of Appeals for the Federal Circuit's decision in *Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1365 (Fed. Cir. 1999) to support its argument that articles are of the same "class or kind" as required by Additional Rule of Interpretation 1(a), HTSUS, if "commercially fungible." *Primal Lite*, 182 F.3d at 1365.

[25]This Court will address the appraisement cause of action separately.

IV. Cross-Motions for Partial Summary Judgment

A. *Standard of Review*

This case is before the Court on plaintiffs' motion and defendant's cross-motion for partial summary judgment. Under U.S. CIT R. 56(c), summary judgment is appropriate if, based on the papers before the Court, "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." When deciding summary judgment motions in classification cases, the Court must first ascertain the proper meaning of the specific terms in the tariff provision, a question of law, and second determine whether the merchandise at issue comes within the description of such terms as properly construed, a question of fact. *See SGI, Inc. v. United States*, 122 F.3d 1468, 1471 (Fed. Cir. 1997). The parties claim there are no genuine issues as to any material facts; therefore partial summary judgment is appropriate in this matter. This Court agrees.

The sole issue before the Court is a question of law[26] pertaining to the proper interpretation of pertinent sections of the HTSUS. *See id.* (citing *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483 (Fed. Cir. 1997)). The Court will conduct a *de novo* review of this matter based on the record before it pursuant to 28 U.S.C. § 2640(a)(1) (1994).[27]

B. *Classification Under the HTSUS*

The proper classification of merchandise entering the United States is directed by the General Rules of Interpretation (GRI) of the HTSUS and the Additional United States Rules of Interpretation. *See Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). The HTSUS scheme is organized by headings; each of which has one or more subheadings providing a more particularized segregation of the heading at issue. *See id.* Under the GRI, the Court must first construe the language of the heading and any section or chapter notes in question to determine whether the product at issue is classifiable under the heading. Only then may the Court look to the subheadings to find the correct classification for the merchandise at issue. *See id.* at 1440; GRI 1, 6.[28]

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[26] Customs's decisions are entitled to a presumption of correctness under 28 U.S.C. § 2639(a)(1) (1994); however, where "a question of law is before the Court on a motion for summary judgment, the statutory presumption of correctness is irrelevant." *Blakley Corp. v. United States*, 15 F. Supp. 2d 865, 869 (CIT 1998) (citing *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997)).

[27] In this case, Customs has not promulgated any regulations interpreting the relevant headings or subheadings; therefore, the Court will conduct *de novo* review based on the record before it pursuant to 28 U.S.C. § 2640(a)(1) (1994). *See Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 (Fed. Cir. 1999) (citing *Mead Corp. v. United States*, 185 F.3d 1304, 1307 (Fed. Cir. 1999)).

[28] General Rule of Interpretation (GRI) 1 states, in pertinent part, "[C]lassification shall be determined according to the terms of the headings and any relative section or chapter notes . . . ."

GRI 6 states:

> For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable.

"As with other statutory provisions, it is the function of the court to interpret the tariff acts in a manner that will fulfill or carry out the intent of Congress." *Neco Elec. Prods. v. United States*, 14 CIT 181, 183 (1990). To ascertain Congress' intent, the Court first looks to the plain meaning of the statutory text. *See Marcor Dev. Corp. v. United States*, 926 F. Supp. 1124, 1129 (CIT 1996) (citing *Trans-Border Customs Servs. v. United States*, 843 F. Supp. 1482, 1485 (CIT 1994)). If the plain language of the statute demonstrates the clear and unambiguous intent of Congress, the Court's inquiry is complete. *See id.* However, absent any contrary indication of Congressional intent from the statute or legislative history, tariff terms are construed in accordance with their common and popular meaning. *See Lynteq, Inc. v. United States*, 976 F.2d 693, 697 (Fed. Cir. 1992). In construing such terms, the Court may "'rely upon its own understanding, dictionaries and other reliable sources.'" *North Am. Processing Co. v. United States*, 56 F. Supp. 2d 1174, 1179 (CIT 1999) (quoting *Medline Indus., Inc. v. United States*, 62 F.3d 1407, 1409 (Fed. Cir. 1995)).

1. *Heading 4202, HTSUS, "[V]anity cases . . . similar containers . . . traveling bags, toiletry bags . . . purses . . . similar containers . . . ."*

In this matter, the parties' arguments principally address the proper subheading classification within heading 4202, HTSUS, for the merchandise at issue. The parties appear to agree the cosmetics bags are properly classified under heading 4202, HTSUS, "[V]anity cases . . . and similar containers; . . . traveling bags, toiletry bags . . . purses . . . and similar containers . . . ." Even so, pursuant to *Jarvis Clark*, 733 F.2d at 878, the Court must consider whether classification of the merchandise at issue is, in fact, appropriate under heading 4202, HTSUS.

Heading 4202, HTSUS, is comprised of a list of exemplars some of which arguably describe the merchandise at issue in this matter. Defendant argues the merchandise at issue may be considered as "vanity cases," "traveling bags," "toiletry bags," or "similar containers." Plaintiffs appear to argue the merchandise at issue, which they refer to as cosmetics bags, may be considered as "similar containers" in the second part of heading 4202, HTSUS. (*See* Defendant's Motion at 7, 16; Memorandum of Law in Support of Plaintiffs' for Partial Summary Judgment (Plaintiffs' Motion) at 17.) Because the Court finds the language of heading 4202, HTSUS, is unclear and legislative history provides this Court with no clarification as to those exemplars or phrases in heading 4202, HTSUS, under which the merchandise at issue may be classified properly, the Court will use the rule of *ejusdem generis* to ascertain whether the merchandise at issue may be classified properly under heading 4202, HTSUS.

In applying the rule of *ejusdem generis*, the Court must consider whether the merchandise at issue possesses the essential characteristics or purposes that unite the listed examples preceding

the general term or phrase in the statute. *See Avenues in Leather, Inc. v. United States*, 178 F.3d 1241, 1244 (Fed. Cir. 1999). It is well-established that the essential characteristic and purposes of the heading 4202, HTSUS, exemplars is "to organize, store, protect and carry various items." *SGI, Inc.*, 122 F.3d at 1471; *Totes, Inc. v. United States*, 865 F. Supp. 867, 872 (CIT 1994). In this matter, the parties stipulate the cosmetics bags are used to contain, "organize and segregate cosmetics [and toiletry products.]" (Plaintiffs' Statement Under Rule 56(i) of Material Facts as to Which There is No Dispute (Plaintiffs' Statement of Facts) at ¶ 10; Defendant's Response to Plaintiffs' Statement under Rule 56(i) of Material Facts As to Which There is No Dispute (Defendant's Response to Plaintiffs' Facts) at ¶ 10 (Admits but avers irrelevant).) Due to the breadth of exemplars listed in heading 4202, HTSUS, the exemplars' essential characteristics and purpose, the parties' stipulation, and the Court's inability to find any other appropriate heading, the Court finds the merchandise at issue properly classified under heading 4202, HTSUS, because it is used to organize personal items, *i.e.*, cosmetics.

2. *Proposed Subheading Classifications within Heading 4202, HTSUS.*

In this matter, the parties advance three subheadings within heading 4202, HTSUS, as possible classifications for the merchandise at issue: subheading 4202.12, HTSUS, as "[V]anity cases;" subheading 4202.32, HTSUS, as "Articles of a kind normally carried in the pocket or in the handbag;" subheading 4202.92.45, HTSUS, as "Other . . . Travel, sports and similar bags . . . Other."

a. *Merchandise at Issue Prima Facie Classifiable under Subheading 4202.12, HTSUS, "[V]anity cases."*

Defendant argues the cosmetics bags are properly classifiable under subheading 4202.12, HTSUS, as "[V]anity cases." Plaintiffs oppose this classification. This Court agrees with defendant that the merchandise at issue is *prima facie* classifiable under subheading 4202.12, HTSUS.

Subheading 4202.12, HTSUS, "[V]anity cases" is an *eo nomine* tariff designation.[29] Even so, the Court finds the term is not clearly defined by the headings, subheadings, or chapter notes of Chapter 42, HTSUS. In addition, the Court finds Congress did not specify its intent as to the term "vanity cases." *See* subheading 4202.12, HTSUS. Thus, the Court must determine the common meaning of the term "[V]anity case" as used in the statute. *See North Am.*, 56 F. Supp. 2d at 1178.

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[29] *See supra* note 21.

Various definitions of the term "vanity case" are advanced by "dictionaries and other reliable sources" to which the Court looks to discern a tariff term's common meaning. *Id.* at 1179. The OXFORD ENGLISH DICTIONARY 430 (2d. ed. 1989) defines "vanity case" as "a small hand-bag, etc., for ladies, fitted with a mirror and powder-puff." According to the AMERICAN HERITAGE DICTIONARY 1944 (3rd ed. 1996), a "vanity case" is " 1. [a] small handbag or case used by women for carrying cosmetics or toiletries. 2. a woman's compact." The RANDOM HOUSE DICTIONARY OF ENGLISH LANGUAGE 1580 (1966) defines the term as "a small luggage bag or case for holding cosmetics or toiletries used or carried by women." The Court notes the common meaning of the term "vanity case" appears to include various forms of the article: a compact; a small handbag or case used by women for carrying cosmetics; and a small luggage bag for cosmetics.

Plaintiffs argue the term "[V]anity case[]" as used in heading 4202, HTSUS, and subheading 4202.12, HTSUS, only refers to a small piece of luggage for cosmetics. Plaintiffs base their argument on the Session Notes of the Harmonized System Committee (HSC) of the Customs Cooperation Council and its working party. Comparing terminology in the French and English versions of the HTS, plaintiffs maintain, the term "[V]anity cases," as used in the HTSUS, was intended to be the equivalent of the French term "les mallettes de toillettes," *i.e.*, little trunk for toilet articles. The Court finds plaintiffs' argument unpersuasive.[30]

"Congress is presumed to know the language of commerce, and to have framed tariff acts so as to classify commodities according to the general usage and denomination of the trade." *John v. Carr & Son, Inc. v. United States*, 77 Cust. Ct. 103, 107 (1976). Therefore, because Congress used the term "vanity cases" within the statute without limitation as to form, it may be presumed all forms of the articles are meant by Congress to be included therein. "'[A]n eo nomine designation, with no terms of limitation, will ordinarily include all forms of the named article.'" *Carl Ziess*, 195 F.3d at 1379 (quoting *Hayes-Sammons Chem. Co. v. United States*, 55 CCPA 69, 75 (1968)). Because the Court finds the common meaning of the term "vanity case[]" includes a small handbag or case used to hold cosmetics, the Court finds the merchandise at issue in this matter, described by the parties as cosmetics bags used to contain cosmetics, *prima facie* classifiable under subheading 4202.12, HTSUS.

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[30]Both parties support their arguments by citing to the Session Notes of the Customs Cooperation Council's Harmonized System Committee and its Working Party. The Court notes, however, working documents, such as commentary by delegations on questions before Harmonized System Committee which are designed to frame issues for discussion, carry virtually no weight in interpreting the Harmonized System even though they may contain more detailed descriptions of the goods under consideration and the rationale for certain positions. *See* STRUM, R., CUSTOMS LAW & ADMINISTRATION, § 50.2, 17 (Supp. 1999).

b. *Merchandise at Issue Prima Facie Classifiable under Subheading 4202.32, HTSUS, "Articles of a kind normally carried in the pocket or in the handbag."*

Plaintiffs argue the cosmetics bags are classified properly under subheading 4202.32, HTSUS, as "Articles of a kind normally carried in the pocket or in the handbag." Defendant opposes such classification arguing the plain and unambiguous language of subheading 4202.32, HTSUS, precludes such classification.

i. *"[I]n the pocket or in the handbag"*

Defendant first argues the language of subheading 4202.32, HTSUS, specifically "in the pocket or in the handbag," plainly and unambiguously indicates Congress only meant to include small pocket articles in the provision. Such an interpretation necessarily would exclude the merchandise at issue because it can not be carried in a pocket. In support, defendant cites the exemplars enumerated in the Explanatory Notes as "Articles of a kind normally carried in the pocket or in the handbag" and points out that those articles are capable of being carried in the pocket *and* in the handbag. Also, Customs cites the drafting history of the HTS to support "the validity of [this] conclusion[]." *Universal Transcon. Corp. v. J.E. Bernard & Co.*, 42 CCPA 69, CAD 573 (1954). Defendant contends because subheading 4202.32, HTSUS, was added pursuant to the suggestion from the United States delegate to the HSC that a subheading be added to encompass small pocket articles, the resulting phrase "Articles of a kind normally carried in the pocket or in the handbag" should be read only to include small pocket articles.

The Court agrees with defendant that the language "in the pocket or in the handbag" of subheading 4202.32, HTSUS, is plain and unambiguous, however, the Court disagrees with Customs's narrow reading of the phrase. The defendant's construction of the statute would have the court ignore the disjunctive "or" and rob the phrase "in the handbag" of its independent and ordinary significance. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979). The Court notes "[i]n construing a statute we are obliged to give effect, if possible, to every word Congress used." *Id.* at 339. Subheading 4202, HTSUS, encompasses articles of a kind normally carried "in the pocket or in the handbag." "Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise. . . ." *Id.* The Court notes "[w]here the language of a statute demonstrates a clear intent of Congress, that intent is regarded as conclusive." *Marcor*, 926 F. Supp. at 1129. Accordingly, this Court finds articles normally carried in a handbag may fall within subheading 4202.32, HTSUS.

In this matter, the parties stipulate the cosmetics bags may be "small enough to be housed within a handbag." (Plaintiffs' Statement of Facts at ¶ 9; Defendant's Response to Plaintiffs' Facts at ¶ 9.) Given the parties' stipulation and the plain meaning of the phrase "in the pocket

or in the handbag," the Court finds the merchandise at issue is not precluded from classification under subheading 4202.32, HTSUS, as "Articles of a kind normally carried in the pocket or in the handbag."

ii. *"Articles of a kind normally carried . . ."*

The first part of the statutory phrase used in subheading 4202.32, HTSUS, "Articles of a kind normally carried in the pocket or in the handbag," invokes the concept of use due to its inclusion of the phrase "of a kind." *See Primal Lite, Inc. v. United States*, 15 F. Supp. 2d 915, 917 (CIT 1998) ("The use of the term 'of a kind' is nothing more than a statement of the traditional standard for classifying [an] importation by [] use.").[31] While the Court agrees with the parties that subheading 4202.32, HTSUS, is a use provision, the Court notes subheading 4202.32, HTSUS, addresses use in a particular context which is independent of the purpose for which the merchandise at issue is utilized, *i.e.*, to contain, "organize and segregate cosmetics [and toiletry products]." (Plaintiffs' Statement of Facts ¶ 10; Defendant's Response to Plaintiffs' Facts ¶ 10 (Admits but avers irrelevant).) Subheading 4202.32, HTSUS, "Articles of a kind normally carried in the pocket or in the handbag" addresses the manner in which articles are employed or used, *i.e.*, "normally carried," to serve their intended purpose or use.

When use is invoked by the language of the HTSUS, the Court turns to Additional U.S. Rule of Interpretation 1 (USRI 1), which states "a tariff classification controlled by use . . . is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that *class or kind* to which the imported goods belong, and the controlling use is the principal use." USRI 1 (emphasis added). In this case, the Court must determine whether the cosmetics bags are of "that class or kind to which the imported goods belong." USRI 1; *see United States v. Carborundum Co.*, 536 F.2d 373, 377 (CCPA 1976). To make this determination the Court traditionally has used a totality of the circumstances test, specifically considering factors such as: the physical characteristics of the merchandise; the expectation of ultimate purchasers; the channels of trade; and use. *See Carborundum*, 536 F.2d at 377. However, in 1999, the Federal Circuit appears to have renamed the traditional test

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[31] The Court notes the phrase "of a kind" principally has been interpreted in tariff provisions utilizing the term "use." *See, e.g., Primal Lite, Inc. v. United States*, 15 F. Supp. 2d 915 (CIT 1998) (Interpreting subheading 9405.40.80, HTSUS, "lighting sets of a kind used for Christmas trees . . . Other."). Even so, the Court does not find the lack of the term "use" in subheading 4202.32, HTSUS, a limitation because a designation by use may be established, although the word "use" or "used" does not appear in the language of the statute. *See E.C. Lineiro v. United States*, 37 CCPA 10, 14, CAD 411 (1949).

to determine "class or kind" under USRI 1 under the guise of "commercial fungibility." *Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1365 (Fed. Cir. 1999) ("[W]e construe the [HTSUS] to call for a determination as to the [class or kind] of goods that are commercially fungible with the imported goods.").[32]

In *Primal Lite*, the Federal Circuit affirmed a lower court ruling which focused on use between the kind or class of merchandise implicated by the HTSUS provision at issue, "lighting sets of a kind used for Christmas trees," and the imported merchandise at issue. *See Primal Lite*, 15 F. Supp. 2d at 917. The "commercial fungibility" to which the Federal Circuit refers appears to implicate fungibility in terms of the use specified by the tariff provision at issue. Therefore, in order to find the merchandise at issue classifiable under subheading 4202.32, HTSUS, it must have a use which is fungible with that which defines the class or kind described in the subheading, *i.e.*, normally carried in the pocket or in the handbag.

The Court notes subheading 4202.32, HTSUS, does not specify the articles encompassed therein; however, the Explanatory Notes[33] for Chapter 42 provide "[Subheadings 4202.21, 4202.32 and 4202.29] cover articles of a kind normally carried in the pocket or in the handbag and include spectacle cases, note-cases (bill-folds), wallets, purses, key-cases, cigarette-cases, cigar-cases, pipe-cases and tobacco-pouches." The class or kind defined by the subheading appears to be items which have independent and various functions, albeit normally carried in the pocket or in the handbag.

In this matter, the parties stipulate: "[w]omen normally carry some cosmetics with them so that they can have cosmetics with them on a daily basis;" "[w]omen normally carry a handbag for convenience to contain various personal items, including cosmetics, that they want to have about their person on a daily basis;" and "[c]osmetic bags are items that are used to carry cosmetics and [some[34] are] small enough to be housed within a handbag." (Plaintiffs' Statement of Facts at ¶¶ 7, 8, 9; Defendant's Response to Plaintiffs' Facts at ¶¶ 7, 8, 9 (Averring cosmetic bags large enough for nighttime use.).) In addition,

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[32]The Court notes the test set forth in *United States v. Carborundum Co.*, 536 F.2d 373, 377 (CCPA 1976) is not refuted in *Primal Lite*, 182 F.3d at 1365.

[33]It has been long settled that "while the Explanatory Notes do not constitute controlling legislative history, they do offer guidance in interpreting HTS subheadings." *Lonza, Inc. v. United States*, 46 F.3d 1098, 1109 (Fed. Cir. 1995).

[34]The Court notes plaintiffs maintain "[c]osmetic bags are items that are used to carry cosmetics and it is small enough to be housed within a handbag." (Plaintiffs' Statement of Facts at ¶ 9.) Defendant responds "[a]dmit[ting] that cosmetics bags are containers that are used to carry cosmetics, aver[ring] that certain cosmetic bags are small enough to be used in conjunction with a handbag for daytime use . . . ." (Defendant's Response to Plaintiffs' Facts at ¶ 9.) Also, plaintiffs aver the cosmetics bags "are of a size to be carried in a handbag" (Plaintiffs' Statement of Facts at ¶ 11), and defendant responds "den[ying] that these articles are all of a size to be carried in a handbag and avers that this denial does not create a genuine issue as to any material fact. Further avers that certain of these articles are themselves the size of handbags." (Defendant's Response to Plaintiffs' Facts at ¶ 11.) In brief, defendant further states "cosmetic bags are certainly carried in the handbag." (Defendant's Reply Memorandum in Opposition to Plaintiff's Cross-Motion for Partial Summary Judgment at 8.) The Court recognizes defendant's statements as to the size of some of the cosmetics bags at issue are directed to its argument that some of the cosmetics bags may be carried independently of a handbag. The Court notes, however, such a possibility does not mean such cosmetic bags may not be carried within a handbag, and that they are not normally so carried.

defendant does not appear to specifically refute or contest expert testimony presented by plaintiffs that women normally carry cosmetics bags in their handbags.

> Q. How did that mix of what she had match up to what you would normally [sic] from the rest of your research expect were [sic] the types of things that women will carry around in their handbag?
>
> A. Well . . . one of the sources that I read and that I quote in the book [*Bags, A Lexicon of Style*, Valerie Steele & Laird Borrelli, (Scriptum Editions, 1999)] is from Esquire Magazine, which had an article a few years ago called "Your Wife: A User's Manual, Her Purse" . . . the exact quote . . . "Women carry useful objects, including medication, band-aids, an organizer . . . cosmetics and cosmetic bag[s] . . . ." [O]ne thing that people almost always tend to mention is that they will carry cosmetics and a cosmetics bag . . . ."

(Plaintiffs' Motion for Partial Summary Judgment, Exhibit P, Deposition of Dr. Valerie Steele at 65-67, 69.) Based on the parties' stipulations and uncontested expert testimony, the Court finds the cosmetics bags at issue may be housed in a handbag and are so normally carried. Therefore, the merchandise at issue has a use that is commercially fungible with the class or kind specified in subheading 4202.32, HTSUS.

Defendant argues the merchandise at issue is not commercially fungible with the articles covered by subheading 4202.32, HTSUS. Defendant maintains plaintiffs have failed to bring forth evidence of commercial fungibility demonstrating the cosmetics bags are "competitive with and can replace the articles 'of a kind normally carried in the pocket or in the handbag.'" (Defendant's Reply Memorandum in Opposition to Plaintiff's [sic] Cross-Motion for Partial Summary Judgment at 12.) The Court finds defendant's analysis, grounded in notions of product substitutability, too narrow given the use provision at issue. As noted above, subheading 4202.32, HTSUS, is not a traditional use provision implicating the use of the merchandise at issue. Subheading 4202.32, HTSUS, addresses the manner in which articles are employed or transported. Accordingly, defendant's interpretation of commercial fungibility is contrary to the plain meaning of the statute. On its face, subheading 4202.32, HTSUS, is a provision encompassing various articles which are employed in a similar manner. Restricting classification in the manner advocated by defendant would narrow the subheading contrary to legislative intent. Moreover, defendant's application of fungibility is further refuted by the Explanatory Notes which include a list of "Articles of a kind normally carried in the pocket or in the handbag." This Court notes these exemplars are not directly substitutable, *e.g.*, a wallet for a pipe-case, although they are fungible in the manner in which they are employed, *i.e.*, normally carried in the pocket or in the handbag.

For the reasons stated above, the Court finds the merchandise at

issue *prima facie* classifiable under subheading 4202.32, HTSUS, as "Articles of a kind normally carried in the pocket or in the handbag."

c. *Subheading 4202.92.45, HTSUS, "Other . . . Travel, sports and similar bags . . . Other."*

Subheading 4202.92.45, HTSUS, "Other . . . Travel, sports and similar bags . . . Other" is a residuary or basket provision.[35] "Classification of imported merchandise in a basket provision, however, is appropriate only when there is no tariff category that covers the merchandise more specifically." *Chevron Chem. Co. v. United States*, 59 F. Supp. 2d 1361, 1368 (CIT 1999); *see also E.M. Chems. v. United States*, 923 F. Supp. 202, 206 (CIT 1996). Because the Court finds the merchandise at issue *prima facie* classifiable under two alternative subheadings which covers the merchandise at issue more specifically, the Court will not address classification under subheading 4202.92.45, HTSUS.

3. *The Subheading Preferred for Classification*

The Court finds the cosmetics bags at issue *prima facie* classifiable under subheadings 4202.12, HTUSU, "[V]anity Cases," and 4202.32, HTSUS, "Articles of a kind normally carried in the pocket or in the handbag." Pursuant to GRI 3(a), when a product is *prima facie* classifiable under two or more subheadings, "[t]he [sub]heading which provides the most specific description shall be preferred to [sub]headings providing a more general description." GRI 3(a). Therefore, classification of the product turns on which of these two provisions is the more specific. *See Orlando Food Corp. v. United States*, 140 F.3d 1437, 1441 (Fed. Cir. 1998). "Under this so-called rule of relative specificity, [the Court] look[s] to the provision with requirements that are more difficult to satisfy and that describe the article with the greatest degree of accuracy and certainty." *Id.* (citing *United States v. Siemens Am., Inc.*, 653 F.2d 471, 477 (CCPA 1981); *see Carl Zeiss*, 195 F.3d at 1380.

The Court also recognizes the general rule of Customs jurisprudence that, "'in the absence of legislative intent to the contrary, a product described by both a use provision and an eo nomine provision is generally more specifically provided for under the use provision.'" *Orlando*, 140 F.3d at 1441 (quoting *Siemens Am.*, 653 F.2d at 478). However, this Court notes this rule is not obligatory and only provides a "'convenient rule of thumb for resolving issues where the competing provisions are in balance [*i.e.*, equally descriptive].'" *Carl Zeiss*, 195

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[35]The Court notes the parties agree subheading 4202.92.45, HTSUS, "Other . . . Travel, sports and similar bags . . . Other," is a residuary provision. (*See* Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment at 17; Defendant's Reply Memorandum in Opposition to Plaintiffs' Cross-Motion for Partial Summary Judgment at 28.)

F.3d at 1380 (quoting *Siemens Am.*, 653 F.2d at 478 n.6); *see also Totes, Inc. v. United States*, 69 F.3d 495, 500 (Fed. Cir. 1995). In this matter, the Court must determine the relative specificity between subheading 4202.12, HTSUS, an *eo nomine* provision, and subheading 4202.32, HTSUS, a use provision.

Even though the Court recognizes the long standing maxim that a use provision is usually more specific than an *eo nomine* provision, the Court declines to apply it to the instant case because the Court finds the competing subheadings do not "equally describe" the merchandise at issue. *See E.M. Chems. v. United States*, 920 F.2d 910, 916 (Fed. Cir. 1990). The Court finds subheading 4202.12, HTSUS, "[V]anity cases," more specifically describes the cosmetics bags at issue than subheading 4202.32, HTSUS, "Articles of a kind normally carried in the pocket or in the handbag." The Court's finding is premised on the Court's understanding that the use provision at issue in this case is not one which implicates the primary use of the merchandise at issue but rather the manner in which it is employed, *i.e.*, normally carried in the pocket or in the handbag. Unlike subheading 4202.12, HTSUS, which specifies a single article for proper classification, subheading 4202.32, HTSUS, is a broad provision encompassing a variety of articles with specific and independent uses as illustrated by the Explanatory Notes. Because the subheadings are not equally specific, the Court will not prefer the use provision over the *eo nomine* provision. Therefore, because the Court finds no other subheading more appropriate, the Court finds the merchandise at issue are correctly classified under subheading 4202.12, HTSUS, as "[V]anity cases."

CONCLUSION

For the reasons stated above, the Court finds the merchandise at issue classified properly under subheading 4202.12.20, HTSUS, as "[V]anity cases . . . With outer surface of plastics," dutiable at a rate of 20% *ad valorem*. Accordingly, plaintiffs' Motion for Partial Summary Judgment is denied, and defendant's Cross-Motion for Partial Summary Judgment is granted.

GREGORY W. CARMAN
Chief Judge

Dated: September 1, 2000
New York, New York

(Slip-Op. 00-116)

LEN-RON MANUFACTURING CO., INC., *ET AL.*, PLAINTIFFS, *v.* UNITES STATES, DEFENDANT.

Consol. Court No. 94-08-00488

Order

This matter having been duly submitted for decision and this Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision it is hereby

ORDERED that defendant's Motion to Dismiss In Part be, and hereby is , granted with respect to classification only; and it is further

ORDERED that plaintiffs' Motion for Partial Summary Judgement be and hereby is, denied and it is further

ORDERED that defendant's Cross-Motion for Partial Summary Judgement be, and hereby is , granted and it is further

ORDERED that Customs classify the entries at issue in this action under subheading 4202.12.20 Harmonized Tariff Schedule of the United States dutiable at a rate of 20% *ad valorem*; and it is further

ORDERED that this action as it related to classification of the merchandise at issue be, and hereby is, dismissed.

GREGORY W. CARMAN
Chief Judge

Dated: September 1, 2000
New York, New York

(Slip Op. 00-117)

ASOCIACION DE PRODUCTORES DE SALMON Y TRUCHA DE CHILE AG, PLAINTIFF, *v.* UNITED STATES INTERNATIONAL TRADE CIMMISSION, DEFENDANT, COALITION FOR FAIR ATLANTIC SALMON TRADE, DEFENDANT-INTERVENOR.

Court No. 98-09-02759

Arnold & Porter, (*Michael T. Shor* and *Kevin T. Traskos*) for plaintiff Asociacion de Productores de Salmon y Trucha de Chile AG.

Lyn M. Schlitt, General Counsel, Office of the General Counsel, U.S. International Trade Commission; *James A. Toupin*, Deputy General Counsel, Office of the General Counsel, U.S. International Trade Commission; *Tina Potuto*, Attorney, Office of the General Counsel, U.S. International Trade Commission, for defendant.

Collier, Shannon, Rill & Scott, PLLC, (*Michael J. Coursey*, *Kathleen W. Cannon*, and *John M. Herrman*) for defendant-intervenor Coalition for Fair Atlantic Salmon Trade.

ORDER

In the original remand order the Court instructed the United States International Trade Commission ("Commission") to "verify the accuracy of its foreign production, shipments and capacity data" and to "take any action necessary after reexamining the foreign production, shipments and capacity data." *See Asociacion de Productores de Salmon y Trucha de Chile AG v. United States International Trade Commission et al.*, Court No. 98-09-02759, Slip Op. 99-58 (July 2, 1999) ("*Remand Order*").

After finding that the Commission did not comply with the *Remand Order* the Court issued *Asociacion de Productores de Salmon y Trucha de Chile AG v. United States International Trade Commission et al.*, Court No. 98-09-02759, Slip Op. 00-87 (July 27, 2000) ("*Second Remand Order*") directing the Commission to

"either (1) adjust the 1998 production data for the consolidated subject producers or (2) justify the determination that the 1998 production data is, as is, the best information available to it."

In response to the *Second Remand Order*, on August 28, 2000, the Commission filed The Commission's Determination on Remand ("Second Remand Determination"). In the Second Remand Determination the Commissioner found, among other things, "that information necessary to my determination is not available on the record, and the unadjusted [1998 production] data are the facts otherwise available for me to reach my determination. 19 U.S.C. § 1677e(a)." *See* Second Remand Determination, at 9 n.27.

The Commission, however, fails to explain how its Second Remand Determination complies with the statutory requirements for adopting facts otherwise available. *See* 19 U.S.C. §§ 1677e, 1677m (1994).

Specifically, section 1677e(a) states:

(a) In general

If-

(1) necessary information is not available on the record, or

(2) an interested party or any other person-

(A) withholds information that has been requested by the administering authority or the Commission under this sub title,

(B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,

(C) significantly impedes a proceeding under this subtitle, or

(D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title, the administrating authority and the Commission shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

19 U.S.C. 1677e(a)(1994). Section 1677m(d) states:

(d) Deficient submissions

If the administrating authority or the Commission determines that a response to a request for information under this subtitle does not comply with the request, the administrating authority or the Commission (as the case may be) shall *promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle.* If that person submits further information in response to such deficiency and either -

(1) the administrating authority or the Commission (as the case may be) finds that such response is not satisfactory, or

(2) such response is not submitted within the applicable time limits, then the administrating authority or the Commission (as the case may be) may, subject to subsection (e) of this section, disregard all or part of the original and subsequent responses.

19 U.S.C. 1677m(d)(1994)(emphasis added).

The Court thus remands to the Commission for an explanation of how the Commission's decision to refuse to adjust the 1998 production data, and thus use facts otherwise available, complies with the specific statutory requirements. The Court remands to the Commission with the hope that the Commission's explanation will be responsive, and limited, to the Court's specific instructions. Thus, it is hereby

ORDERED that the Commission's determination, Second Remand Determination, is remanded in conformance with this order;

ORDERED that Commission shall, within fifteen (15) days of the date of this Order, issue a remand determination.

ORDERED that the parties may, within ten (10) days of the date on which the Commission issues its remand determination, submit memoranda addressing the Commission's remand determination, not to exceed five (5) pages in length; and it is further

ORDERED that the Commission may, within ten (10) days of the date on which memoranda addressing the Commission's remand determination are filed, submit a response memorandum, not to exceed five (5) pages in length.

RICHARD W. GOLDBERG
Judge

Dated: September 8, 2000
New York, New York

NOTICE OF ENTRY AND SERVICE

This is a notice that an order or judgement was entered in the docket of this action, and was served upon the parties ont he date shown below.

Service was made by depositing a copy of this order or judgement, together with any papers required by USCIT Rule 79(c), in a securely closed endorsed penalty cover in a United States mail recaptacle at One Federal Plaza, New York, New York 10007 and addressed to the attorney or record for each party at the address on the official docket in this action, except that service upon the United States was made by personally delivering a copy to the Attorney-In-Charge, International Trade Field Office, Civil Division, United States Department of Justice, 26 Federal Plaza, New York, New York 10278 or to a clercial employee designated, by the Attorney-In-Charge in a writing field with the clerk of the court.

LEO M. GORDON
Clerk of the Court

By STEVE TAROY
Deputy Clerk

Date: September 8, 2000

(Slip Op. 00-118)

BOLTEX MANUFACTURING CO.,: L.P., *ET. AL.*, PLAINTIFFS, *v.* UNITED STATES OF AMERICA, DEFENDANT, AND UNITED STATES FLANGES AND FITTINGS MARKING COALITION, DEFENDANT-INTERVENOR.

Court No. 00-07-00314

[Plaintiffs' Motion for Judgment on the Agency Record granted.]

Decided: September 8, 2000.

Mayer, Brown & Platt (*Simeon M. Kriesberg*), *Kathryn Schaefer, Andrew A. Nicely*, for Plaintiffs.

David W. Ogden, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, Department of Justice (*Barbara M. Epstein*); *Paula Smith*, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of counsel, for Defendant.

McKenna & Cuneo, LLP (*Peter Buck Feller*), *Daniel G. Jarcho*, *Vincent M. Routhier*, *Myron Paul Barlow*, for Defendant-Intervenor.

I.

INTRODUCTION

BARZILAY, *Judge:* This case is before the court pursuant to USCIT R. 56.1(c) providing for judgment on an agency record. Plaintiffs (hereinafter "Plaintiffs" or "Boltex") are importers of carbon and stainless steel forgings.[1] After importation, Boltex subjects the forgings to certain processes in the United States and sells them as pipe fittings and flanges.[2]

Boltex challenges the determination of the United States Customs Service ("Customs") announced in Treasury Decision ("T.D.") 00-15, *Final Interpretation: Application of Producers' Good Versus Consumers' Good Test in Determining Country of Origin Marking*, 65 *Fed. Reg.* 13827 (March 14, 2000) ("*Final Interpretation*"). The *Final Interpretation* announces that Customs will no longer be bound by a particular test in determining country of origin and, as a result, pipe fittings and flanges made in the United States with imported forgings must be marked with the country of origin of the forgings. *See id.* at 13831. Boltex claims that this final determination unlawfully changes 30 years of industry practice to its detriment. It asks this court to vacate Customs' decision and, in the alternative, to enjoin Customs from enforcing the decision pending judicial review on the merits if

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[1] Forgings are rough steel forms that have been created from a pipe, billet or bar. *See Pls.' Mem. of P. & A. in Supp. of Pls.' Mots. for J. on the Agency R. and for a Prelim. Inj.* ("*Pls.' Br.*") at 5.

[2] Fittings and flanges are made of steel and used to connect pipe sections and components in a variety of applications. *Pls.' Br.* at 5.

the court is unable to render a decision before September 11, 2000, the effective date of the *Final Interpretation*. The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(h)(1994).[3]

II.

BACKGROUND

Federal law requires that every article of foreign origin that is imported into the United States be marked with its country of origin in such a manner that its ultimate purchaser will be aware of its country of origin. *See* 19 U.S.C. § 1304(a)(1994). An ultimate purchaser is defined in Customs regulations as generally "the last person in the United States who will receive the article in the form in which it was imported. . . ." 19 C.F.R. § 134.1(d) (1999). When a foreign article is subjected to manufacturing in the United States before reaching the consumer, the regulations provide some guidance as to when the manufacturer will be regarded as the ultimate purchaser. A manufacturer will be considered the ultimate purchaser "if he subjects the imported article to a process which results in a substantial transformation of the article, even though the process may not result in a new or different article. . . ." 19 C.F.R. § 134.1(d)(1).[4] On the other hand, if the manufacturing process is "merely a minor one which leaves the identity of the imported article intact," the consumer is regarded as the ultimate purchaser. 19 C.F.R. § 134.1(d)(2). In the former case the product is not subject to the country of origin marking statutes; in the latter the country of origin must appear on the product.

Our court and its predecessors have struggled valiantly to determine what processing will result in a substantial transformation. Many tests have been articulated and applied, depending on the product and processes at issue.[5] In 1970 the Customs Court decided *Midwood Industries v. United States*, 64 Cust. Ct. 499, 313 F. Supp. 951 (1970), *appeal dismissed*, 57 C.C.P.A. 141 (1970). In *Midwood*, an importer of steel forgings protested Customs' decision to exclude its merchandise because it was not properly marked. *See id.*, 64 Cust.

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[3] 28 U.S.C. § 1581(h) provides:

> The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

Although Defendant does not challenge jurisdiction under this provision, the court has reviewed Plaintiffs' affidavits and finds that they have made the requisite showing of irreparable harm.

[4] *But see* 19 C.F.R. §134.35(a)(1999) (stating,"the manufacturer . . . who converts or combines the imported article into the different article will be considered the 'ultimate purchaser' . . . .").

[5] The country of origin determination and thus, substantial transformation, is also at issue in questions such as eligibility for duty preferences, drawback and others. *See, e.g., Koru North America v. United States*, 12 CIT 1120, 1126, 701 F. Supp. 229, 234 n.9 (1988); *Nat'l Juice Prod. Ass'n v. United States*, 10 CIT 48, 58, 628 F. Supp. 978, 988 n. 14 (1986).

Ct. at 500, 313 F. Supp. at 952. Customs claimed that the existing markings were obliterated by the finishing process and the forgings had to be marked so that the marking would appear after the processing was complete. *See id.*, 64 Cust. Ct. at 502, 313 F. Supp. at 953. The importer claimed that the ultimate purchaser of the forgings was the processor in the United States that converted them to pipe fittings and flanges. *See id.*, 64 Cust. Ct. at 500-501, 313 F. Supp. at 952. The court agreed, holding that the forgings were substantially transformed after importation into pipe fittings and flanges and, therefore, the importer's marking was proper. *See id.*, 64 Cust. Ct. at 507-508, 313 F. Supp. at 957.

Following the *Midwood* decision, Customs issued several ruling letters to importers of forgings confirming that the United States manufacturers of the end products, the pipe fittings and flanges, were indeed the ultimate purchasers for purposes of the marking statute.[6] These rulings were important as the processes performed in the United States usually obliterate the die-stamped marking which appears on the forging in its imported condition.[7]

In 1993 Congress passed the *North American Free Trade Agreement* ("NAFTA") *Implementation Act,* Pub. L. No. 103-182, § 207, 107 Stat. 2057 (1992), (codified as amended at 19 U.S.C. §3304 (1996)), which included special rules for determining whether an article would be considered a product of one of the signatory countries and thus eligible for whatever preferential treatment the agreement afforded that product. The NAFTA country of origin rules are voluminous and complex. *See* 19 U.S.C. § 3332 (1996). Briefly, as relevant here, they generally provide that evidence of substantial transformation will be determined by a change in the Harmonized Tariff classification, a "tariff shift." That is, the process performed on the product must result in a change in the Harmonized Tariff Schedule of the United States ("HTS" or "HTSUS") classification for that product to be considered substantially transformed. These tariff shift rules are product specific and were negotiated by the parties and codified by statute. *See* 19 U.S.C. § 3332(a)(1)(B)(I).

The NAFTA marking rules were promulgated by T.D. 95-69, 60 *Fed. Reg.* 46188 (1995), *as amended by* T.D. 96-56, 61 *Fed. Reg.* 37817 (1996), and appear in 19 C.F.R. § 102.20 (1996). Under the rules, forgings, pipe fittings and flanges are all classified under HTS heading 7307, covering "[t]ube or pipe fittings . . . of iron or steel." Therefore, for marking purposes, a substantial transformation does not

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[6] *See, e.g.*, Headquarters Ruling Letters ("HRL") 559871 (February 18, 1997), 734673 (December 17, 1992), 732883 (August 1, 1990), 730416 (May 11, 1987), and 700022 (October 27, 1972).

[7] In 1984 Congress amended the marking statute to require that certain pipe and fittings be marked by means of die-stamping or similar processes. *See* 19 U.S.C. § 1304(c).

occur in the finishing process, and the pipe fittings and flanges must be marked with the country of origin of the forgings themselves. This development created an anomaly for the steel pipe fitting industry. Pipe fittings and flanges made from Mexican or Canadian forgings had to be marked, while pipe fittings and flanges made from forgings imported from any other country did not.

In April 1996, Maass Flange Corporation ("Maass") wrote to Customs complaining that the "country of origin marking regulations are not uniform as to imported goods from NAFTA and non-NAFTA countries." *Administrative Record* ("*AR*") at 0164. While recognizing that the NAFTA marking rules "do not technically apply to non-NAFTA origin goods," Maass requested that they be so applied. *See AR* at 0167, 0170. On May 14, 1996 Customs responded, suggesting that Maass file a petition pursuant to 19 U.S.C. § 1516(a)(1984), as Customs could not grant the relief requested.[8]

On February 18, 1997, Customs issued HRL 559871 in response to a ruling request from an importer of steel forgings from Mexico, Germany and Italy. *See AR* at 0174. In the ruling letter, Customs explained that the NAFTA marking rules applied to the forgings from Mexico, but not to those imported from Germany and Italy. It stated:

> [A]fter notice and comment in the Federal Register, the NAFTA Marking Rules set forth at 19 CFR Part 102 were not adopted for all trade, and the *Midwood* decision, while questioned in subsequent court decisions, has not been overruled. Accordingly, to the extent that forgings are not imported from a NAFTA Party, the NAFTA Marking Rules will not apply. In the absence of other information that the flanges being imported from non-NAFTA countries are undergoing operations that are different from the processes performed in *Midwood*, the *Midwood* case still will be applicable for determining the country of origin marking requirements. Therefore, steel flanges processed from forgings of Italian or German origin, as described above, will not require any country of origin marking for Customs purposes.

AR at 0178.

In May 1997, Customs met with Maass representatives and assured them that Customs "will be publishing a notice that will have the effect of reconciling [*Midwood*], as applied by Customs, and the NAFTA marking rules of origin." *AR* at 0122. Shortly after the Maass meet-

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[8] 19 U.S.C. § 1516, *Petitions by domestic interested parties*, provides:

(a) Request for classification and rate of duty; petition

(1) The Secretary shall, upon written request by an interested party furnish the classification and the rate of duty imposed upon designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by such interested party. If the interested party believes that the appraised value, the classification, or rate of duty is not correct, it may file a petition with the Secretary setting forth-

(A) a description of the merchandise,
(B) the appraised value, the classification, or the rate of duty that it believes proper, and
(C) the reasons for its belief.

ing several officials of the Department of the Treasury and Customs met to discuss "whether it is necessary to follow *Midwood* outside the context of the NAFTA Marking Rules. . . ." *AR* at 0180. It was agreed that "the *Midwood* decision would not need to be applied if proper notice and comment procedures were again followed." *Id.* Recognizing that such a procedure would evoke controversy one official "questioned whether the notice in the *Federal Register* could be named something other than a notice of 'change in practice' or 'change in position.'" *Id.*

Accordingly, on March 26, 1998, Customs published a *Notice of Proposed Interpretation; Solicitation of Comments: Application of Producers' Good Versus Consumers' Good Test in Determining Country of Marking*, 63 *Fed. Reg.* 14751 (1998)("*Proposed Interpretation*"), advising the public that it "does not intend to rely on the distinction between producers' goods and consumers' goods in making country of origin marking determinations" and soliciting comments. Although the notice discussed the *Midwood* case in detail and analyzed other substantial transformation cases, it did not cite 19 U.S.C. § 1625(d) (1993) nor did it suggest any action that would result from its intention not to rely on the producers' goods-consumers' goods distinction.[9] Customs did explain:

> In *Midwood Industries, Inc. v. United States*, 313 F. Supp. 951 (Cust. Ct. 1970), the U.S. Customs Court considered whether an importer of steel forgings was the ultimate purchaser for purposes of the marking statute, 19 U.S.C. 1304. The court cited the principles set forth in *United States v. Gibson-Thomsen Co., Inc.*, 27 CCPA 267 (1940), in determining that the importer's manufacturing operations made it the ultimate purchaser, namely that the importer may be considered the ultimate purchaser for marking purposes if it subjects the article to further processing that results in the manufacture of a new article with a new name, character and use. However, the *Midwood* court also found it relevant to that finding that the imported forgings at issue were transformed from producers' goods to consumers' goods, stating:
>
> > While it may be true . . . that the imported forgings are made as close to the dimensions of ultimate finished form as is possible, they, nevertheless, remain forgings unless and until converted by some manufacturer into consumers' good, i.e., flanges and fittings. And as producers goods the forgings are a material of further manufacture, having, as such, a special value and ap-

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[9] 19 U.S.C. § 1625(d) provides:

Publication of Customs decisions that limit court decisions:

> A decision that proposes to limit the application of a court decision shall be published in the Customs Bulletin together with notice of opportunity for public comment thereon prior to a final decision.

> peal only for manufacturers of flanges and fittings. But, as consumers' goods and flanges and fittings produced from these forgings are end use products, having, as such, a special value and appeal for industrial users and for distributors of industrial products. *Midwood* at 957.
>
> It is Customs' opinion that based on subsequent court decisions applying substantial transformation analysis, *Midwood* would be decided differently today.

63 *Fed. Reg.* at 14751. The *Proposed Interpretation* ends by stating, "[i]f this proposal is adopted, parties may seek clarification regarding the continued viability of any ruling that they believe was based on the producers' goods- consumers' goods analysis articulated in *Midwood*." *Id.*

On March 14, 2000, Customs published the *Final Interpretation*. On the next to last page of the *Final Interpretation*, in response to a comment, Customs states:

> The change in treatment proposed by Customs will place all importers of pipe fittings and flanges on an equal footing . . . . Because the current country of origin marking requirement for pipe fittings and flanges is based on administrative treatment, rather than a specific ruling, Customs will require that all pipe fittings and flanges produced in the United States from imported forgings be marked with the country of origin of the imported forging.

65 *Fed. Reg.* at 13830. Apparently, this was the first public discussion by Customs that a change in marking would be required. The *Final Interpretation* continues: "Customs has provided notice in the Customs Bulletin (and Federal Register) as required by 19 U.S.C. 1625(d) of its intention not to rely on the producers' to consumers' good test." 65 *Fed. Reg.* at 13831. Boltex filed its complaint in this action on July 11, 2000.

In its motion for judgment, filed August 11, 2000, Boltex alleges that 1) Customs exceeded its statutory authority when it effectively overruled the Custom Court's decision in *Midwood*; 2) Customs denied Plaintiffs' due process rights by failing to give adequate notice and comment opportunity; 3) Customs unlawfully failed to articulate a "compelling reason" for its decision to disregard *Midwood*; 4) the Final Interpretation is arbitrary and capricious as a matter of law because Customs targets fittings and flanges manufacturers and because it requires that fittings and flanges made from non-NAFTA-origin forgings be marked in accordance with the NAFTA marking rules; 5) Customs wrongly concluded that *Midwood* is no longer good law; and 6) Customs abused its discretion in setting the effective date so that the fitting and flange industry is required to comply with new marking rules within months.

Customs counters that 1) its determination as announced in the *Final Interpretation* to limit the *Midwood* decision was expressly authorized by statute, 19 U.S.C. § 1625(d), and regulation, 19 C.F.R. §

177(d)(1998); 2) it provided notice and a meaningful opportunity to comment on its limitation of "the *Midwood* criterion"; 3) it need not articulate a compelling reason for its determination; 4) it did not unlawfully discriminate against the fittings and flanges industry and did not improperly apply NAFTA rules to imports from non-NAFTA countries; and 5) it did not abuse its discretion in setting the effective date for its new marking requirements.

III.

STANDARD OF REVIEW

28 U.S.C. § 2640 (1994) defines the scope and standard of review for the Court of International Trade. Section 2640(e) provides, "[i]n any civil action not specified in this section, the [court] shall review the matter as provided in [5 U.S.C. § 706]." Plaintiffs claim, and Defendant does not dispute, that this action is properly brought within the court's jurisdiction under 28 U.S.C. § 1581(h) (1994). *See Pl.'s Br.* at 16; *Def.'s Br.* at 14. As section 2640 does not specify the standard of review for civil actions filed under 28 U.S.C. §1581(h), the court reviews Plaintiffs' motion under 5 U.S.C. §706 (1994). The court must "hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706(2)(A). The scope of review is limited to the administrative record. *See* 28 U.S.C. § 2640(e); 5 U.S.C. § 706; USCIT R. 56.1.

Plaintiffs acknowledge that the appropriate standard of review in this case is the arbitrary and capricious standard, but argue that the court should accord no deference to Customs's actions. *See Pls.' Br.* at 26. Boltex further asserts that because the *Final Interpretation* consists solely of legal analyses and conclusions, the court should exercise *de novo* review. *See id.* at 26, 27. The court agrees with Defendant that *de novo* review is not applicable when a court reviews the actions of an administrative agency on the record made before the agency. *See Def.'s Br.* at 21. The court notes, however, that the Administrative Procedures Act ("APA"), provides that in reviewing agency actions, the court "shall decide all relevant questions of law, [and] interpret constitutional and statutory provisions. . . ." 5 U.S.C. 706.[10] It is well-settled that the arbitrary and capricious standard of review is not merely deferential to agency action, but the *most* deferential of the APA standards of review. *See* In re *Gartside*, 203 F. 3d 1305, 1312 (Fed. Cir. 2000) ("Because this [arbitrary and capricious] standard is generally considered to be the most deferential of the APA standards of review, . . . the reviewing court analyzes only whether a

[10]This appears to be a codification of the bedrock constitutional principle first enunciated in *Marbury v. Madison*, 5 U. S. (1 Cranch) 137 (1803).

rational connection exists between the agency's factfindings and its ultimate action")(citations omitted). The court must uphold the agency's actions unless Customs' conclusion was plainly unreasonable or irrational.

IV.

DISCUSSION

A. *Customs has the authority to limit a decision of this court.*

Because of the mechanics of the importing process and the fact that each import entry is considered a separate cause of action, Customs has always enjoyed the discretion not to apply a decision of this court to later-imported entries, even of the same merchandise. *See* 19 U.S.C. § 1514(c) (1994) (providing for filing of a protest for each entry); *J.E. Bernard & Co., Inc. v. United States*, 66 Cust. Ct. 545, 550, 342 F. Supp. 496, 503 n. 9 (1971) (noting that each importation is a separate cause of action). Reasons for this authority, as well as an outline of the nature and history of judicial review of Customs' decisions are found in *United States v. Stone & Downer Co.*, 274 U.S. 225 (1927). This authority is codified at 19 C.F.R. § 177.10(d)(1998), which provides:

> (d) Limiting rulings. A published ruling may limit the application of a court decision to the specific article under litigation, or to an article of a specific class or kind of such merchandise, or to the particular circumstances or entries which were the subject of the litigation.

In 1993, as part of the *Customs Modernization Act* ("*Mod Act*"), Congress added 19 U.S.C. § 1625(d) as follows: "A decision that proposes to limit the application of a court decision shall be published in the Customs Bulletin together with notice of opportunity for public comment thereon prior to a final decision." In its brief, Defendant asserts that "[s]ection 1625(d), in essence, codified Customs regulation, 19 C.F.R. §177.10(d)." *Def.'s Br.* at 33. While it is true that § 1625(d) speaks to Customs' authority to limit a court decision, the statute does not simply codify the regulation. Rather, it places an important condition upon Customs' actions. Whereas before the statute's enactment, Customs could exercise that authority without providing an opportunity for notice and comment; in passing §1625(d), Congress intended to, and did, impose a notice and comment requirement whenever Customs chose to limit a court decision.

The legislative history of § 1625(d) explains that the purpose of the statute is to "provide assurances of transparency concerning Customs rulings and policy directives through publication in the Customs Bulletin or other easily accessible source." H.R. REP. No. 103-361 at 124 (1993), reprinted in 1993 U.S.C.C.A.N. 2552, 2674. The requirement of publishing and soliciting comments on a decision to limit a judicial holding also acts to alert any importers that could be adversely af-

fected by the limitation to challenge the limitation administratively, and if unsuccessful, to seek prompt review in this court pursuant to 28 U.S.C. § 1581(h).[11] It therefore embodies within the statute an early warning system for aggrieved importers, and notifies the agency that it may be required to defend its decisions before this court. As discussed, the court will affirm any contested limitation decision if it finds a rational connection between the agency's factfinding and its ultimate action. *See* In re *Gartside*, 203 F.3d at 1312.

After briefing was completed and before oral argument, Plaintiffs brought to the court's attention T.D. 78-481, *Notice that Final Court Decisions Adverse to the Customs Service will be Given General Effect Unless a Limited Ruling is Published Within 180 Days: Modification and Clarification of* T.D. 78-302, ("*Modification*"), 43 *Fed. Reg.* 57208 (1978). In the *Modification*, Customs states that it will announce its intention to limit adverse holdings of this court within six months of the court's decision. *See id.* at 57208. It further explains the procedures to be followed with regard to liquidation and reliquidation of entries when Customs acquiesces in an adverse holding and "in those relatively rare and unusual circumstances" when it does not. 43 *Fed. Reg.* at 57209. Plaintiffs then argue that even were Customs "limiting" *Midwood*, the agency cannot do so in contravention of this notice, thirty years after the court decision. At oral argument, Defendant presented several reasons why T.D. 78-481 is not controlling, the most important being that the time limit announced was never codified in statute or regulation, and therefore has no precedential effect. *See* T.D. 78-414, 12 *Cust. B. & Dec.* 920 (1978) (providing that a T.D. designation will be used when publication is necessary, but does not constitute legal precedent).

The *Modification* is instructive, however, because it sheds light on reasons why Customs may want to limit an adverse court holding. For instance, Customs states that a holding may be limited "until the legal principle or issue involved could be reconsidered by the courts on the basis of a more complete presentation of evidence." 43 *Fed. Reg.* at 57209. Customs further describes these situations as:

> those relatively rare and unusual circumstances in which a determination to limit an adverse decision is made, usually in cases in which the Customs Service believes that the specific evidence available for judicial evaluation has not provided to the courts an adequate basis for establishing a universally applicable rule of law . . . .

Id. Customs may limit a court decision; the court now analyzes Customs' action in this case to discern whether it can be sustained as rational.

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[11] 28 U.S.C. § 1581(h) is a limited waiver of sovereign immunity and provides for judicial review of a ruling prior to the importation of the goods involved, upon a showing of irreparable harm.

B. *Customs' action was an abuse of its discretion.*

In the *Final Interpretation*, Customs changed the marking requirements for imported forgings based on its own determination that *Midwood* is no longer good law. Customs thereby abused its discretion in two ways. First, Customs encroached upon judicial authority by attempting to overrule a viable judicial decision. Second, Customs abused its discretion by relying on a legal conclusion that the producers' goods-consumers' goods distinction is no longer good law, rather than engaging in and providing a reasoned factual analysis, or in the words of the *Modification*, "a more complete presentation of the evidence," in determining that the forgings would no longer be considered substantially transformed. 43 *Fed. Reg.* at 57209.

1) Customs has overstepped its authority by overruling Midwood.

a. *Midwood is a continuing judicial decision that has not been overruled by this court or a superior court.*

Customs attempts to defend its actions by arguing that *Midwood* is no longer good law. The court has carefully analyzed our predecessor court's opinion in *Midwood* and cannot agree with Customs. Much of the *Midwood* opinion discusses the various processes involved in converting forgings into fittings and flanges. The testimony quoted in the opinion centers on the use of the imported articles. *See* 64 Cust. Ct. at 506, 313 F. Supp. at 956. The court also refers to testimony regarding nomenclature. *See id.* The court then discusses and quotes from *Gibson-Thomsen* the essential language concerning "a new article having a new name, character and use." 27 C.C.P.A. at 271. The opinion clearly states,

> [W]e are also of the opinion that the end result of the manufacturing processes to which the imported articles are subjected in plaintiffs' Tube Line plant is the transformation of such imported articles into different articles having a new name, character and use.

64 Cust. Ct. at 507, 313 F. Supp. at 957.

The *Midwood* court then proceeds to discuss the forgings as producers' goods until "converted by some manufacturer into consumers' goods." *Id.* But this analysis is by no means the sole basis of the court's holding. The producers' goods-consumers' goods distinction serves as a supplement to the court's analysis and conclusion based on the *Gibson-Thomsen* test of a new name, character and use. This reading of the *Midwood* decision is supported by several subsequent decisions of the Customs Court, the Court of International Trade, and the Court of Appeals for the Federal Circuit.[12]

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[12] *See, e.g., Torrington Co. v. United States*, 764 F. 2d 1563, 1571 (Fed. Cir. 1985) (citing *Midwood* for its determination that forgings for flanges could enter the United States without country-of-origin markings because the imports were producers' goods while the finished flanges were consumers' goods); *Uniroyal, Inc. v. United States*, 3 CIT 220, 226, 542 F. Supp. 1026, 1031 (1982), aff'd, 702 F.2d 1022 (Fed. Cir. 1983) (distinguishing the facts in *Midwood* from the facts before the court, without overruling the producers' goods-consumers' goods distinction); *Ferrostaal Metals Corp. v. United States*, 11 CIT 470, 477, 664 F. Supp. 535, 541 (citing with approval the *Midwood* decision as support for its proposition that "[s]uch a change in the utility of the product is indicative of a substantial transformation"); *Superior Wire v. United States*, 11 CIT 608, 616, 669 F. Supp. 472, 479 (1987) (indicating that *Midwood* has been cited with approval in *Torrington* and held not determinative in *Uniroyal*).

In support of its statement that *Midwood* would be decided differently today, and that Customs has therefore not acted irrationally, Defendant cites and discusses several judicial opinions wherein "numerous Judges in this Court and the Federal Circuit have also elected **not** to be bound by that particular criterion in making a decision regarding whether imported merchandise was 'substantially transformed' for marking purposes." *Def.'s Br.* at 24. Customs first cites *Nat'l Hand Tool Corp. v. United States*, 16 CIT 308, 312 (1992), 1992 WL 101006, at *4, wherein this court declined to follow *Midwood's* producers' goods-consumers' goods distinction in its analysis of whether a substantial transformation had occurred. *Id.* at 28. In an attempt to support its argument, Customs acknowledges that the court considered the "totality of the evidence," but "clearly did not feel it was compelled to rely upon every factor ever utilized by every court in determining whether the forgings there were 'substantially transformed.'" *Id.* at 29; *Nat'l Hand Tool*, 16 CIT at 311, 1992 WL 101006 at *4. Customs' argument proves too much. While true that in *Nat'l Hand Tool*, the court did not even mention *Midwood*; neither did the court rule that the *Midwood* distinction would hereafter cease to exist. No party to this lawsuit claims that every single factor utilized by every court in determining whether a substantial transformation has occurred must be evaluated in making that determination. What Plaintiffs do aver is that Customs "strayed far beyond its authority when it announced the abrogation of *Midwood*." *Pls.' Br.* at 29.

Defendant then attempts to bolster its argument by analogizing its position to the ruling in *Nat'l Juice Products Assoc. v. United States*, 10 CIT 48,60, 628 F. Supp. 978, 989-90 (1986). *Def.'s Br.* at 29. Defendant correctly notes that in that case, this court held that the Customs ruling at issue, which utilized criteria other than the *Midwood* distinction to determine that a substantial transformation had not occurred, was rational and reasonable. *Id.* at 30. While the *Nat'l Juice* court did hold that "[u]nder recent precedents, the transition from producers' to consumers' goods is not determinative," it did not overrule the *Midwood* decision. 10 CIT at 60, 628 F. Supp. at 990. Rather, the court clarified the meaning of *Midwood*, noting that the "significance of this producers' goods-consumers' goods transformation in marking cases is diminished. . . ." 10 CIT at 60, 628 F. Supp. at 989-90. Nowhere in the *Nat'l Juice* opinion is any statement indicating that *Midwood* is no longer good law.

Customs next asserts that *Uniroyal, Inc. v. United States*, 3 CIT 220, 542 F. Supp. 1026 (1982), supports its conclusion that the *Midwood* decision need not be relied upon. *See Def.'s Br.* at 30. While true that the *Uniroyal* court did not find the producers' to consumers' goods distinction to be determinative of whether a substantial transformation had occurred, neither did the court find that the *Midwood* distinction should never again be used in that determination. *Uniroyal*, 3 CIT at 226, 542 F. Supp. at 1031. The court agrees with Plaintiffs that "a fair reading of *Uniroyal* confirms that the court did not reject

Midwood at all in that 1982 case." *Pls.' Br.* at 46. Judge Maletz in *Uniroyal* determined that under the name, character and use test within which the *Midwood* distinction is one potential consideration, a substantial transformation had not occurred, because "only a minor assembly process takes place. . . ." 3 CIT at 225, 542 F. Supp. at 1030. The opinion went on to clarify that "each case must be decided on its own particular facts." *Id.*, 3 CIT at 224, 542 F. Supp. at 1029 (citations omitted). Thus, Customs is correct that *Uniroyal* stands for the proposition that the court is not required to rely on the producers' goods-consumers' goods distinction in making its substantial transformation determination. However, *Uniroyal* does nothing to support Customs' complete abrogation of the *Midwood* distinction.

Finally, Customs cites *Superior Wire v. United States*, 11 CIT 608, 669 F. Supp. 472 (1987), *aff'd*, 867 F. 2d 1409 (Fed. Cir. 1989), stating that "[a]lthough listed as one of many factors, the producer good/consumer good distinction was neither explicitly endorsed, nor relied upon by the court in making its determination." *Def.'s Br.* at 31. In that opinion, the court mentioned *Midwood*, but did not state that the distinction should no longer be relied upon in a substantial transformation determination. The court even mentioned in its conclusion that no substantial transformation had occurred, that "[n]o transformation from producers' to consumers' goods took place. . . ." *Superior Wire*, 11 CIT at 617, 669 F. Supp. at 480. Such a statement indicates that far from being abrogated, the court did consider the *Midwood* distinction in determining whether a substantial transformation had occurred. The court agrees with Boltex that "if this Court intended to question *Midwood*, it could have done so expressly." *Pls.' Br.* at 47.

Customs' attempt to support its action with judicial decisions fails. Taken as a whole, the decisions of this court and the Federal Circuit indicate only that the *Midwood* distinction is one of many indicia of whether a substantial transformation has taken place in marking cases. Customs is correct that *Midwood* need not be relied upon in all instances. However, Customs may not extract from this direction the proposition that *Midwood* is never to be relied upon in determining substantial transformation. Judicial decisions do not indicate that *Midwood* has been or should be overruled; Customs may not take such a task into its own hands.

b. *Customs has abrogated, rather than limited, the holding of Midwood.*

Black's Law Dictionary defines the term "limit" as follows: "[t]o abridge, confine, restrain, and restrict. To mark out; to define; to fix the extent of." BLACK'S LAW DICTIONARY 926 (6th ed. 1990). Clearly, the object of the limitation remains in existence following the limitation. In this case, Customs did publish a notice of proposed interpretation, providing an opportunity for public comment before issuing its ruling, although nowhere in that notice does Customs cite its regulatory authority for limiting a court decision, 19 C.F.R. § 177.10(d), nor the

statute pursuant to which it now claims it was publishing the notice, 19 U.S.C. § 1625(d). In the *Proposed Interpretation*, Customs states that it "does not intend to rely on the distinction between producers' goods and consumers' goods in making country of origin marking determinations." 63 *Fed. Reg.* at 14751.[13] After the promulgation of the *Final Interpretation*, Customs issued a decision revoking several HRLs that, based on the *Midwood* analysis, held that certain fittings and flanges manufactured from imported forgings did not have to be marked with the country of origin. *See* 34 *Cust. B. and Decis.* 3 (Aug. 2, 2000).

At the center of Plaintiffs' case is its allegation that Customs has completely abrogated the *Midwood* decision through its promulgation of the *Final Interpretation*. Boltex asserts that the change in marking law resulting from the *Final Interpretation's* conclusion that Customs would hereafter eliminate the producers' goods-consumers' goods distinction from the "substantial transformation" determination, is a proposal to "overrule this Court, and impose a marking requirement in direct contradiction of this Court's holding." *Pls.' Br.* at 4. As discussed earlier, Customs does indeed have the authority to *limit* a court decision; however, the agency may not *entirely ignore* judge-made law. *See supra* Section IV A.[14]

In its defense, Customs asserts that it did not abrogate the *Midwood* decision; rather, the agency limited the effect and application of one of the criteria that was used in the *Midwood* court's analysis of "substantial transformation," with respect to different importations of other importers. *Def.'s Br.* at 33. Customs goes on to illustrate that as there is no rule of administrative *stare decisis* it may, within its realm of authority, change its position regarding a 30-year-old Customs case. *Id.* at 37. Finally, Customs refers the court to its analysis in the *Final Interpretation*, stating that "in light of judicial decisions issued after *Midwood*, it believed that the issues presented in *Midwood* would be decided differently today." *Id.*

All of Customs' defenses fail. First, it may well be possible that *Midwood* would be decided differently today. Yet, it is not the prerogative of the United States Customs Service to make such a determination. True, Defendant's *Final Interpretation* does not specifically state that it intended to overrule *Midwood*. Rather, it states, without providing any factual analysis whatsoever, that Customs does

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[13] *Compare Proposed Rule Making: Proposal to Limit the Decision of the Court of International Trade in Nestle Refrigerated Food Co. v. United States*, 1995 WL 664435 (Oct. 17, 1995), wherein Customs declared its intention to limit the decision "to the specific entries which were before the court," citing both the statute and the regulation.

[14] As the regulation so dictates, Customs may limit a judicial decision to (1) a specific article under litigation, (2) an article of a specific class or kind, or (3) to the particular circumstances or entries which were the subject of the litigation. *See* 19 C.F.R. § 177.10(d).

not intend to rely on the producers' goods-consumers' goods distinction in determining whether the country of origin of the imported article must be marked on the final product. The *Final Interpretation* concludes:

> Because the current country of origin marking requirement for pipe fittings and flanges is based on administrative treatment, rather than a specific ruling, Customs will require that *all* pipe fittings and flanges produced in the United States from imported forgings be marked with the country of origin of the imported forging. (emphasis added).

65 *Fed. Reg.* at 13830. How Customs has in fact limited the application of *Midwood* with this statement, rather than overruling it, remains a mystery to the court. It apparently was also a mystery to Customs as recently as February 18, 1997, when, in response to a ruling request, it refused to alter the marking rules for forgings imported from non-NAFTA countries by stating, "the *Midwood* decision, while questioned in subsequent court decisions, has not been overruled." HRL 559871, *AR* at 0178.

Plaintiff argues that Customs is prevented from imposing a new marking requirement on United States pipe fittings and flanges in contravention of the *Midwood* holding. *See Pls.' Br.* at 32-33. The court agrees. Plaintiff goes on to argue that "neither the cited statute nor the cited regulation . . . provides Customs with the authority to disregard a court decision in its entirety." *Id.* at 33. This statement presents a closer case, as it must be reconciled with Customs' authority to limit a court decision. The court's research has discerned no cases addressing the relationship between judicial authority and Customs' ability to limit a court decision.[15] The words of the regulation alone provide little guidance.

Direction may be found in the principle enunciated in *Schott Optical Glass v. United States*, 750 F.2d 62, 64 (Fed. Cir. 1984). In *Schott,* this court held that relitigation was barred by *stare decisis*, a court's refusal to reexamine legal issues previously decided. 7 CIT 36, 39, 587 F. Supp. 69, 71 (1984). The plaintiff, an importer of optical glass, appealed the judgment refusing to allow it to introduce evidence in a second trial demonstrating that the court's prior holding classifying the glass was clearly erroneous. 750 F.3d at 62. The Court of Appeals for the Federal Circuit reversed and remanded, citing the well-recognized exception to the rule of *stare decisis*, that a court will re-examine and overrule a prior decision that is clearly erroneous. The Federal Circuit required the lower court to afford the importer an oppor-

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[15] *But see Orlando Food Corp v. United States*, 21 CIT 187, 188 (1997), 1997 WL 108245 at *2, wherein Customs was criticized by the court for using the statute, 19 U.S.C. § 1625(d) "to simply ignore judicial decisions with which it disagrees by providing it with an alternative remedy to appeal. . . . Customs has encroached on the judicial function."(citations omitted).

tunity to introduce evidence to show that the previous classification was clearly erroneous. *See also J.E. Bernard & Co.*, 66 Cust. Ct. at 550, 324 F. Supp. at 502 n.9, where the court refused to allow relitigation of the appraisement of identical merchandise where "matters decided in the first case have remained static, factually and legally . . . and there have been no intervening changes in the legal climate which would require a different result from that reached in the prior case."

Here, if Customs believes that the matters decided in *Midwood* have not remained static factually and legally, and that there have been intervening changes in the legal climate in the past thirty years which would require a different result, it should be given the opportunity to so demonstrate. It must do so, however, by giving reasons for its position based on facts and not by usurping a judicial function. If it can make the requisite showing, and is upheld upon any court review, it can change the marking requirements.[16]

Plaintiffs next argue that Customs specifically targeted fittings and flanges manufacturers, and that Customs cannot require non-NAFTA forgings to be marked in accordance with NAFTA rules, and therefore, should be prevented from making the marking change. However, it is not unreasonable for Customs to attempt to provide uniform marking rules for all imported forgings.[17] No business is guaranteed an unchanged regulatory climate. So long as procedural safeguards are met, government must be free to change the rules to accommodate new business realities.[18] The Customs regulations 19 C.F.R. § 177.9 and § 177.10 set out the specific ways in which Customs may respond to new imports and methods of importing by modifying its position on classification, marking, and other issues. In certain circumstances, they require notice and an opportunity to be heard. *See* 19 C.F.R. § 177.10(c)(2). Here, the procedural safeguards were followed, but the change fails because the agency tried to change the rules by usurping a judicial function.

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[16]Customs endorsed this view in T.D. 78-481, when it announced that in the rare cases where it would limit adverse court decisions, it would do so in order to allow the court to reconsider the issue based on "a more complete presentation of the evidence" in its belief that "the specific evidence available for judicial evaluation has not provided . . . an adequate basis for establishing a universally applicable rule of law." 43 *Fed. Reg.* at 57209.

[17]Customs' attempt to provide uniform marking rules for imported forgings is reasonable, so long as the marking rules are consistent with the requirement that the imported product be marked for the "ultimate purchaser." *See* 19 U.S.C. § 1304(a).

[18]Even though the language of the *Proposed Interpretation* lacked specificity, Plaintiffs received sufficient notice in compliance with the regulatory requirements and general due process concerns. Although the *Proposed Interpretation* did not contain language requiring that the fittings and flanges produced in the United States from imported forgings be marked with the country of origin of the imported forgings, the court cannot agree with Boltex that "Customs did not provide Plaintiffs with *any* notice that it intended to overrule *Midwood's* holding that the manufacture of fittings and flanges substantially transforms imported forgings so as not to require country-of-origin markings on the finished products." *Pls.' Br.* at 36. The comments generated as a result of the *Proposed Interpretation* reflect that the industry involved was well aware of the intended result. *See AR* at 0053, 0054, 0055-0057, 0058-0066. One of the Plaintiffs here submitted comments opposing the proposal. *See AR* at 0097-0103.

2) *Customs abused its discretion by relying on a legal conclusion, rather than engaging in and providing a reasoned factual analysis, in imposing new marking rules.*

In the *Final Interpretation*, Customs requires "that all pipe fittings and flanges produced in the United States from imported forgings be marked with the country of origin of the imported forging." 65 *Fed. Reg.* at 13830. Central to this requirement is Customs' unspoken finding that such forgings are not substantially transformed by the processing in the United States. Customs states in its *Final Interpretation* that because "the issue presented in *Midwood* would be decided differently today, and because the NAFTA marking rules and *Midwood* decision render different results, it is Customs' position that this action is necessary in order to provide equitable treatment to all importers of pipe fittings and flanges." *Id.* However, the Final Interpretation does not contain any recitation by Customs of the factual analysis required to demonstrate its contention that the forgings are not substantially transformed.[19]

Before Customs can require new markings on finished products made from imported articles, it must explain why it no longer considers the forgings substantially transformed. Customs admits as much when it states at the end of the *Final Interpretation*, "the question of whether a good has been substantially transformed is based on specific facts. . ." and declares its intent to revisit rulings which it states were based on the producers' goods-consumers' goods distinction articulated in *Midwood*. *See* 65 *Fed. Reg.* at 13831. Here, Customs abused its discretion by announcing the marking change first, and postponing the factual analysis under the new name, character and use test. Customs cannot justify its actions merely by declaring that it will not longer rely on the producers' goods-consumers' goods test because "*Midwood* would be decided differently today." *Id.* Even were this statement true, such a determination is for a court and not for the agency.

In its analysis, Customs need not use the producers' goods-consumers' goods distinction in determining that forgings are not substantially transformed in the United States by the processes performed in converting them to pipe fittings and flanges. Every substantial transformation case is product specific and certain tests are more applicable than others to certain products. *See Uniroyal,* 3 CIT at 224, 542 F. Supp. at 1029 (citations omitted) (stating that each case must be decided on its own facts). Customs must, however, explain with reference to the forgings themselves and the processes performed on them, why no new article with a new name, character and use is created.

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[19]Customs has accepted that the analysis necessary centers on whether a new article with a new name, character and use has been created. *See* 19 C.F.R. §§ 134.1(d), 134.35(a).

V.

CONCLUSION

For the foregoing reasons, the court concludes that Customs' attempt to overrule this court's determination in *Midwood* was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. The court cannot sustain the marking requirement imposed by the *Final Interpretation*. Judgment will enter accordingly.

JUDITH M. BARZILAY
Judge

Dated: September 8, 2000
New York, NY

(Slip Op. 00-118)

BOLTEX MANUFACTURING CO.,: L.P., *ET. AL.*, PLAINTIFFS, *v.* UNITED STATES OF AMERICA, DEFENDANT, AND UNITED STATES FLANGES AND FITTINGS MARKING COALITION, DEFENDANT-INTERVENOR.

Court No. 00-07-00314

[Plaintiffs' Motion for Judgment on the Agency Record granted.]

Decided: September 8, 2000..

JUDGMENT

This case having been duly submitted for decision and this court, after due deliberation, having rendered a decision herein; now, in conformity with said decision, it is hereby

ORDERED that the Motion of Plaintiffs Boltex Manufacturing Company, L.P. *et al.* for Judgment on the Agency Record is granted; and it is further

ORDERED that the determination of the Customs Service in *Final Interpretation: Application of Producers' Good Versus Consumers' Good Test in Determining Country of Origin Marking*, 65 *Fed. Reg.* 13827 (March 14, 2000), is hereby declared unlawful and is vacated in its entirety; and it is further

ORDERED that the Customs Service shall not enforce 65 *Fed. Reg.* 13827.

SO ORDERED.

JUDITH M. BARZILAY
Judge

Dated: September 8, 2000
New York, NY

(Slip Op. 00-119)

DYNACRAFT INDUSTRIES, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT.

Ct. No. 99-03-00125

[Summary Judgment for Defendant.]

Dated: September 8, 2000

Grunfeld, Desiderio, Lebowitz & Silverman LLP (*Bruce M. Mitchell, Mark E. Pardo* and *Michael T. Cone*), for plaintiff Dynacraft Industries, Inc.

David W. Ogden, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice (*James A. Curley*), *Beth C. Brotman*, Office of Assistant Chief Counsel, United States Customs Service, for defendant.

OPINION

RESTANI, *Judge:* This matter is before the court on cross motions for Summary Judgment, pursuant to USCIT Rule 56, brought by both plaintiff, Dynacraft Industries, Inc. ("Dynacraft"), and defendant, the United States.[1] In this matter, the United States Customs Service ("Customs") refused to grant Dynacraft interest on the cash deposits that it had posted, before any antidumping duty order was published, as security for potential antidumping duties on its imports. *Ruling Letter* (Nov. 24, 1999), at 1-3, HQ 227689, Pl.'s App., Ex. B, at 1-3.

Dynacraft contends that the refusal to refund interest following the final negative antidumping determination violates Customs' obligation to pay interest on duties pursuant to 19 U.S.C.A. § 1505(b) and (c) (West Supp. 1999).[2] Defendant responds that this general statutory provision is inapplicable to antidumping duties. Instead, Defendant argues that 19 U.S.C. §§ 1673f and 1677g, which are found within the unfair trade laws, govern the payment of interest in this case. Defendant contends that these statutory provisions prohibit the payment of interest for security posted before the publication of an antidumping order. The court agrees with Defendant.

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[1]Dynacraft originally styled its motion as a request for Judgment Upon the Agency Record, pursuant to Rule 56.1. Because this case could require the court to make factual determinations rather than review agency decisions upon the record, the motion is properly submitted as a USCIT Rule 56 motion.

[2]19 U.S.C. § 1505 (b) and (c) provides in relevant part:

(b) Collection or refund of duties, fees, and interest due upon liquidation or reliquidation

The Customs Service shall collect any increased or additional duties and fees due, together with interest thereon, or refund any excess moneys deposited, together with interest thereon as determined on a liquidation or reliquidation . . .

(c) Interest

Interest assessed due to an underpayment of duties, fees, or interest shall accrue, at a rate determined by the Secretary, from the date the importer of record is required to deposit estimated duties, fees, and interest to the date of liquidation or reliquidation of the applicable entry or reconciliation . . .

JURISDICTION

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1994).[3] Dynacraft posits that the court may have jurisdiction pursuant to 28 U.S.C. § 1581(i) (1994).[4] Because § 1581(a) provides an adequate method of review, the court does not have jurisdiction pursuant to § 1581(i). *Miller & Co. v. United States*, 824 F.2d 961, 963 (1987) (section 1581(i) does not apply if another subsection of § 1581 is available).

As set forth in 28 U.S.C. § 1581(a), the court has jurisdiction over civil actions contesting the denial of a protest under 19 U.S.C.A. § 1515 (West 1998). Section 1515 requires that protests be filed in accordance with 19 U.S.C.A. § 1514 (West 1998). Section 1514 provides that decisions of Customs, specifically listed in 19 U.S.C. § 1514(a)(1)-(7), shall be final unless an interested party files a protest or unless an interested party files a civil action contesting the denial of a protest in the United States Court of International Trade. 19 U.S.C. § 1514(a). Dynacraft's protest falls within § 1514(a)(5), which involves "the liquidation or reliquidation of an entry."[5] Dynacraft protested the liquidation of entries between November 14, 1995, and April 29, 1996, and the liquidation of entries between March 21 and March 28, 1997, seeking interest on the refunded cash deposits. *Ruling Letter*, at 1, Pl.'s App., Ex. B, at 1. Because Customs denied Dynacraft's protest, and Dynacraft timely appealed therefrom, this action is properly before the court pursuant to 28 U.S.C. § 1581(a). *See American Motorists Ins. Co. v. United States*, 8 F. Supp.2d 874, 875-76 (Ct. Int'l Trade 1998) (holding that plaintiff's challenge of a denial of a protest of lack of interest on additional duties falls under 28 U.S.C. § 1581(a) and not § 1581(i)).

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[3] 28 U.S.C. § 1581(a) provides that:

> The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930 [19 U.S.C. § 1515]. 28 U.S.C. § 1581(a) (1994).

[4] 28 U.S.C. § 1581(i) provides, in relevant part, that:

> In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section . . ., the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for –
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> . . .
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue . . .
>
> 28 U.S.C. § 1581(i) (1994).

[5] Section 1514 provides in relevant part:

> (a) Finality of decisions; return of papers
>
> [D]ecisions of the Customs Service, including the legality of all orders and findings entering into the same, as to –
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> . . .
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> (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof;
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> . . .
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> shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade . . .

STANDARD OF REVIEW

The court shall grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, if any, show that there is no genuine issue as to any material fact and that the moving part is entitled to judgment as a matter of law. USCIT Rule 56(d).

BACKGROUND

The United States Department of Commerce ("Commerce") published an affirmative preliminary determination in its antidumping duty investigation of bicycles from China on November 9, 1995. *Bicycles from the People's Republic of China*, 60 Fed. Reg. 56,567 (Dep't Commerce 1995) (aff. prelim. det.) [hereinafter "*Preliminary Determination*"]. Commerce set a preliminary estimated dumping margin of 5.29% *ad valorem* for entries of merchandise exported by Chitech Industries, Ltd. ("Chitech") made on or after November 9, 1995. Id. at 56,574. The *Preliminary Determination* also held that "[t]he Customs Service will require a cash deposit or posting of a bond equal to the estimated dumping margins . . .." *Id.* at 56,574.

On April 30, 1996, Commerce published its final determination in the antidumping investigation. *Bicycles from the People's Republic of China*, 61 Fed. Reg. 19,026 (Dep't Commerce 1996) (aff. fin. det.) [hereinafter "*Final Determination*"]. Commerce established a final antidumping duty deposit rate for Chitech of 2.05 percent for entries made between April 30, 1996, and May 7, 1996. *Id.* at 19,045.

In June of 1996, in its final injury investigation, the U.S. International Trade Commission ("ITC") determined that imports of bicycles from China did not injure or threaten injury to the U.S. bicycle industry. *Bicycles from China*, 61 Fed. Reg. 33,137, 33,137 (ITC 1996) (neg. fin. injury det.). Customs issued a telex notifying the port directors that the ITC had terminated the investigation involving bicycles from China. *Custom's Telex to Port Directors* (June 6, 1996), at 1, No. 6158117, Pl.'s App., Ex. A, at 1.[6] Customs directed the port directors to suspend liquidation of entries of merchandise covered by the scope of the investigation made between November 9, 1995 and May 7, 1996, and to refund all cash deposits securing estimated antidumping duties on the entries without interest, because 19 U.S.C. § 1677g "does not apply."[7] *Id.*

Between March 1997 and May 1998, Customs liquidated sixty-three entries made by Dynacraft of Chitech exports during the time period

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[6] Both affirmative Commerce and ITC determinations are required before an antidumping duty order is published. 19 U.S.C. § 1673 (1994).

[7] In this case, factual determinations are unnecessary because Dynacraft has adopted Defendants' statement of material facts. Pl.'s Br. at 1. Dynacraft qualified one statement, though, alleging that Customs acknowledged that 19 U.S.C. § 1677g(a) does not apply. Dynacraft misinterprets Customs meaning and actions. Pursuant to that telex, Customs did *not* allow interest for the cash deposits liquidated. Customs explained its terse statement when it denied Dynacraft's protest of denial of interest. Customs clarified that section 1677g did not allow for recovery of interest, *not* that section 1677g did not apply. *Ruling Letter*, at 1-3, Pl.'s App., Ex. B, at 1-3. Thus, only a question of law is before the court.

at issue. Def.'s Br. (Apr. 14, 2000), at 3. Dynacraft filed protests as to these liquidations. Customs then reliquidated the entries and refunded the cash deposits in May, 1998. *Id.* Dynacraft filed a protest of the reliquidations, seeking interest on the refunded cash deposits. *Id.* Customs denied Dynacraft's protests on the ground that the cash deposited as security for estimated antidumping duties are not "estimated 'duties and fees'" within the meaning of 19 U.S.C. § 1505. *Ruling Letter*, at 3, Pl.'s App., Ex. B, at 3.

DISCUSSION

Dynacraft argues that it is entitled to interest because its cash deposits should be considered "excess moneys" under 19 U.S.C. § 1505(b) and (c) (1994). Defendant responds that the actual issue is whether the cash deposits are an amount posted pursuant to an antidumping order as set forth in 19 U.S.C. § 1673f(b) (1994).

Rather than posting a bond, Dynacraft made cash deposits pursuant to 19 U.S.C. § 1673b(d)(1)(B) (1994).[8] In *Timken Co. v. United States*, the Federal Circuit held that the difference between duty deposits made pursuant to § 1673b(d)(1)(B) as security and duty deposits made pursuant to 19 U.S.C. § 1673e(a)(3)[9] as post-antidumping duty order estimated antidumping duties is critical. 37 F.3d 1470, 1477 (Fed. Cir. 1994).[10] In *Timken*, the domestic party sought to have interest collected for the post-preliminary results period because bonds and not cash were deposited as security. The opinion makes clear

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[8] 19 U.S.C. § 1673b(d)(1)(B) provides, in relevant part, that:

(d) [i]f the preliminary determination of the administering authority . . . is affirmative, the administering authority -

. . .

(B) shall order the posting of a cash deposit, bond, or other security, as the administering authority deems appropriate, for each entry of the subject merchandise in an amount based on the estimated weighted average dumping margin or the estimated all-others rate, whichever is applicable . . .

[9] 19 U.S.C. § 1673e(a)(3) (1994) provides, in relevant part, that:

(a) Within 7 days after being notified by the Commission of an affirmative determination . . . the administering authority shall publish an antidumping duty order which —

. . .

(3) requires the deposit of estimated antidumping duties pending liquidation of entries of merchandise at the same time as estimated normal customs duties on that merchandise are deposited.

[10] *Timken* analyzed the pre-URAA version of § 1673f which has remained substantially unchanged since its enactment in 1979. *See* Trade Agreements Act of 1979, Pub. L. 96-39, § 101, 93 Stat. 144, 173 (July 26, 1979). This provision did not change in 1994 except to reflect the re-ordering of the statute. *See* 19 U.S.C. § 1673f, *as amended by* Uruguay Round Agreements Act, Pub. L. 103-465, 108 Stat. 4857 (Dec. 8, 1994) (substituting "1673b(d)(1)(B) for "1673b(d)(2)" in heading and text). Moreover, Congress affirmed the point *Timken* made by changing § 1673f(a) from "cash deposit collected" to "cash, bond or other security." *See* 19 U.S.C. § 1673f(a), *as amended by* Miscellaneous Trade and Technical Corrections Act of 1996, Pub. L. 104-295, § 40, 110 Stat. 3488, 3541 (Oct. 11, 1996); *see also Timken*, 37 F.3d at 1477 (noting that both cash deposits and bonds are security for future duty assessments as set forth in §§ 1673b(d)(2) and 1673f(a)). Therefore, reliance on *Timken* is appropriate.

that whether or not cash is deposited as security pursuant to § 1673b(d)(1)(B), there is to be no recovery of interest pursuant to 19 U.S.C.A. § 1673f(a) (West 1998). *Id.*[11] On the other hand, if cash is deposited as estimated antidumping duties pursuant to § 1673e(a)(3), section 1673f(b)[12] explicitly provides for recovery of interest pursuant to 19 U.S.C. § 1677g (1994) on the post-order deposits. *Id.*[13]

The rationale supporting this scheme can be found in *Hide-Away Creations, Ltd. v. United States*, 8 CIT 286, 598 F. Supp. 395 (1984). In *Hide-Away*, the court addressed, not whether an importer must pay interest on shortfalls, but whether Commerce must pay interest on overpayments of amounts deposited as security for estimated countervailing duties pursuant to 19 U.S.C. § 1677g.[14] As in this case, plaintiff Hide-Away sought interest for cash deposits it had made after an affirmative preliminary determination. *Id.* at 289, 598 F. Supp. at 397. Section 1677g, though, is clear about when liability for interest attaches. "In specifying which entries would be eligible for interest under 19 U.S.C. § 1677g, Congress chose the point in an

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[11] 19 U.S.C.A. § 1673f(a) provides in relevant part:

> If the amount of a cash deposit, or the amount of any bond or other security, required as *security* for an estimated antidumping duty under section 1673b(d)(1)(B) of this title is different from the amount of the antidumping duty determined under an antidumping duty order published under section 1673e of this title, then the difference for entries of merchandise entered, or withdrawn from warehouse, for consumption before notice of the affirmative determination of the Commission . . . is published shall be –
>
> . . .
>
> (2) refunded or released, to the extent that the cash deposit, bond, or other security is higher than the duty under the order.

19 U.S.C.A. § 1673f(a) (West 1998)(emphasis added). No provision for interest is included.

[12] 19 U.S.C. § 1673f(b) provides, in relevant part:

> If the amount of an estimated antidumping duty deposited under 1673e(a)(3) of this title is different from the amount of the antidumping duty determined under an antidumping duty order published under section 1673e of this title, then the difference for entries of merchandise entered, or withdrawn from warehouse, for consumption after notice of the affirmative determination of the Commission . . . is published shall be –
>
> . . .
>
> (2) refunded, to the extent that the deposit under section 1673e(a)(3) of this title is higher than the duty determined under the order,
>
> together with interest as provided by section 1677g of this title.

[13] 19 U.S.C. § 1677g provides, in relevant part:

> Interest shall be payable on overpayments and underpayments of amounts deposited on merchandise entered, or withdrawn from warehouse, for consumption on and after –
>
> (1) the date of publication of a countervailing or antidumping duty order under this subtitle or section 1303 of this title, or
>
> (2) the date of a finding under the Antidumping Act, 1921.

[14] Because section 1677g has not changed in any relevant way since it was enacted in 1979, the court's analysis of when liability attaches remains applicable. *See* 19 U.S.C.A. § 1677g (West 1998), Historical and Statutory Notes; *see also Timken*, 37 F.3d at 1476-77.

investigation at which an importers' liability for countervailing duties first becomes fixed – that is, upon the ITC's final affirmative injury determination." *Id.* at 292-93, 598 F. Supp. at 400. Because the ITC made a negative injury determination in this case, Dynacraft is not entitled to interest on the cash deposits it had posted as security for antidumping duties in lieu of a bond.[15]

Dynacraft argues that regardless of the application of §§ 1673f and 1677g, it may recover interest pursuant to 19 U.S.C. § 1505(b) and (c) "on excess moneys deposited."[16] Dynacraft contends that whether the estimated antidumping duty is either a determined amount or a security is irrelevant because any antidumping duty is a "duty" within the scope of 19 U.S.C. § 1505(b) and that any overpayment is therefore "excess moneys."

The history of the treatment of antidumping and countervailing duties in relation to ordinary duties is informative. Prior to the enactment of the Uruguay Round Agreement Act ("URAA"), both the court and the statute distinguished between regular duties and special duties. The Customs Court originally referred to "regular duties" as those duties "levied under the various schedules of the Tariff Act of 1930 as assessable on all importations of a particular class of merchandise." *International Forwarding Co. v. United States*, 6 Cust. Ct. 881, 882 (Cust. Ct. 1941) (emphasis added). In contrast, "special duties" were those duties "levied against any particular importations, such as marking duties, or additional duties for undervaluation, or countervailing duties." *Id.* As late as 1975, the statute designated "additional duties" as countervailing duties and "special duties" as antidumping duties. 19 U.S.C. § 1516(a) (Supp. V 1975); *see also* Trade Act of 1974, Pub. L. 93-618, Title III, § 331(f)(1), 88 Stat. 2048 (Jan. 3,

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[15] Dynacraft argues that *all* estimated duties, including regular customs duties are a form of security against the ultimate assessment of duties. Pl.'s Br. at 6. Dynacraft ignores the statutory distinction highlighted by § 1673f(a)and(b). Section 1673f(a) addresses amounts deposited as *security* for a potential estimated antidumping duty whereas section 1673f(b) addresses amounts deposited for a *determined amount* of antidumping duty deposited pursuant to an antidumping order. *See* 19 U.S.C. § 1673f(a) and (b). While that determined amount of duty may be adjusted pursuant to a review under 19 U.S.C. § 1675, it may become the final assessed duty if no review is sought from Commerce or pursuant to the review by Commerce. *See* 19 U.S.C. § 1675(a) (1994)(stating procedures for reviewing determinations of antidumping duties); 19 C.F.R. § 353.22(e) (1996) (stating that if petitioner does not request a review, Customs will assess antidumping duties); *see also Torrington Co. v. United States*, 903 F. Supp. 79, 87-88 (Ct. of Int'l Trade 1995) (finding that 19 C.F.R. § 353.22(e) properly provides for automatic assessment of duty if no review is sought pursuant to § 1675); *Oki Elec. Indus. Co. v. United States*, 11 CIT 624, 626-26, 669 F. Supp. 480, 482-83 (1987) (explaining history of § 1675 and holding lack of a § 1675 review request does not prevent injunction of liquidation and judicial review of original determination).

[16] In 1993, § 1505 was broadened to allow refund of interest for any excess money deposited. H. Rep. No. 103-361(I), at 140, *reprinted in* 1993 U.S.C.C.A.N. 2552, 2690 ("The amendments made . . . will . . . provide equity in the collection and refund of duties and taxes, together with interest, by treating collections and refunds equally."). Prior to that time, it provided for interest to be paid to Customs on shortages in the deposit. *Compare* North American Free Trade Implementation Agreement Act, Pub. L. 103-182, § 642, 107 Stat. 2057, 2205 (Dec. 8, 1993) *with* Customs Courts Act of 1970, Pub. L. 91-271, § 204, 84 Stat. 274, 283 (June 2, 1970).

By changing § 1505 to allow for interest for both refunds and collections generally, Congress created an equitable arrangement similar to that under §1673f. For example, neither the government nor an interested party is required to pay interest to the other party on any shortfall or excess of duties deposited between Commerce's preliminary determination and the ITC's final determination. 28 U.S.C.A. § 1673f(a) (West 1998). On the other hand, both the government and an interested party are required to pay interest on any shortfall or excess of duties deposited pursuant to §1673e(a)(3). 19 U.S.C. § 1673f(b).

1975). The court also has noted that antidumping duties are 'special duties'. *See Badger-Powhatan v. United States*, 10 CIT 454, 458, 638 F. Supp. 344, 348-49 (1986).

In 1988, Congress once more acknowledged the distinction between general customs duties and antidumping and countervailing duties when it amended 19 U.S.C. § 1677h (1988).[17] It provided that antidumping and countervailing duties would no longer be treated as "regular customs duties" for purposes of duty drawback. H.R. Conf. Rep. No. 100-576, at 625 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1658. The implication is the opposite of Dynacraft's assertion. It seems that antidumping and countervailing duties were never intended to be regular or general duties.

The URAA statutory scheme has carried forward this distinction. First, antidumping and countervailing duties are separated from other duties and placed within a separate subtitle. *See* Tariff Act of 1930, *as amended by* Uruguay Round Agreements Act, Pub. L. 103-465, 108 Stat. 4809 (1994). Second, antidumping duties and countervailing duties are still treated as "additional duties." 19 U.S.C. § 1673 provides that an antidumping duty shall be imposed "in addition to any other duty imposed." 19 U.S.C. § 1673 (1994); *see also* 19 U.S.C. § 1671 (1994) (providing for countervailing duties in addition to "any other duty imposed").

This history does not support Dynacraft's view that § 1505 controls. Nonetheless, whether or not for some purposes 19 U.S.C. § 1505(b) and (c) include antidumping duties among the "[d]uties, fees, and interest determined to be due upon liquidation or reliquidation," principles of statutory construction prohibit any refund of pre-antidumping duty order cash deposits from including interest. First, a specific statute that addresses a narrow, precise subject, such as §§ 1673f and 1677g, will be given preference over a later-enacted more general statute, such as the provision of § 1505 relied on by Dynacraft, unless there is a clearly expressed congressional intent to the contrary. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) ("It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."). Dynacraft does not proffer any evidence of clearly expressed congressional intent that §§ 1673f and 1677g should no longer govern the payment of interest on antidumping duties.

Second, if 19 U.S.C. § 1505 applied in the manner sought by Dynacraft, the interest provision of 19 U.S.C. § 1673f(b) would be

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[17] Dynacraft asserts that antidumping duties are general or regular duties based on its interpretation of 19 U.S.C. § 1677h. Because the statute states that antidumping duties "shall not be treated as being regular customs duties," 19 U.S.C. § 1677h (1994), Dynacraft claims that antidumping duties should be treated as regular customs duties for all other purposes. As indicated, the court reaches the opposite conclusion. The amendment brought the statute into agreement with the prevailing view of such duties as other than regular duties.

redundant. *Pierce v. Underwood*, 487 U.S. 552, 582 (1988) (citations omitted) (noting that statutes should not be construed to render a part redundant). Third, unless § 1505 also creates liability for interest on the part of the importer for shortages in security after the preliminary determination, a point Dynacraft has not made, application of § 1505 in the manner sought by Dynacraft would create an imbalance in the statute, which is the opposite of the legislative intent of the relevant amendments to § 1505. *See supra*, note 16.

Finally, at the very least § 1673f and § 1677g, when read together with § 1505, create an ambiguity. "In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986), *abrogated by statute on other grounds as stated in Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). This general "no interest" rule "provides an added gloss of strictness" on the usual rule that waivers of sovereign immunity are construed strictly in favor of the sovereign. *Id.* at 318 (citation omitted). The court will not imply that which the statutory text has not unequivocally expressed. *Id.* (citation omitted).

The Federal Circuit also has rebuffed repeatedly any broad reading of the general Customs interest provisions. *See, e.g., International Bus. Mach. Corp. v. United States*, 201 F.3d 1367, 1374 (Fed. Cir. 2000) (no interest on refunds of harbor maintenance tax under § 1505(c)); *Novacor Chemicals, Inc. v. United States*, 171 F.3d 1376, 1381-82 (Fed. Cir. 1999) (under 28 U.S.C. § 1520(d) and previous version of § 1505(c), no interest on refund of duty drawback previously reclaimed by government); *Kalan, Inc. v. United States*, 944 F.2d 847, 850-52 (Fed. Cir. 1991) (under 28 U.S.C. § 1520(d) and previous version of § 1505, no interest on refunds of deposits made for estimated duties deposited at the time of merchandise's entry). In sum, Congress's failure to include expressly antidumping and countervailing duties in the text of 19 U.S.C. § 1505(b) and (c) after it had addressed the issue specifically in 19 U.S.C. §§ 1673f and 1677g is fatal to Dynacraft's contention.[18]

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[18] Dynacraft believes that the court previously decided this issue in *F. LLI De Cecco di Filippo Fara San* MARTINO, S.P.A. v. UNITED STATES, Ct. No. 96-08-01930, 1997 WL 728273 (Ct. Int'l Trade Oct. 23, 1997). In that case, the court awarded interest for cash deposits paid as estimated antidumping duties, at rates established under 19 U.S.C. § 1505(c), as part of a proposed judgment submitted to the court. The parties in that case did not raise the issue of whether interest was owed pursuant to 19 U.S.C. § 1505(c) and the judgment did not resolve that issue. Assuming *arguendo* that the judgment actually can be read to provide for interest on pre-order deposits, the court is not bound by precedent where the issue is not raised by counsel or discussed in the opinion of the court. *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (finding that prior court decision is not binding precedent on point neither raised by counsel nor discussed in the opinion of the court); *National Cable Television Ass'n v. American Cinema Editors, Inc.*, 937 F.2d 1572, 1581 (Fed. Cir. 1991) ("When an issue is not argued or is ignored in a decision, such decision is not precedent to be followed in a subsequent case in which the issue arises.") (citation omitted).

CONCLUSION

The court finds that Dynacraft is not entitled to interest for the cash deposits posted as security for potential estimated antidumping duties in the absence of an antidumping duty order. The court hereby GRANTS Defendant's motion for summary judgment and DENIES Dynacraft's motion for summary judgment.

JANE A. RESTANI
Judge

Dated: New York, New York
September 8, 2000

(Slip Op. 00-119)

DYNACRAFT INDUSTRIES, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT.

Ct. No. 99-03-00125

[Summary Judgment for Defendant.]

JUDGMENT

This case having been submitted for decision and the Court, after deliberation, having rendered a decision therein; now, in conformity with that decision,

IT IS HEREBY ORDERED: enter judgement in favor of defendant.

JANE A. RESTANI
Judge

Dated: New York, New York
September 8, 2000

NOTICE OF ENTRY AND SERVICE

This is a notice that an order or judgement was entered in the docket of this action, and was served upon the parties ont he date shown below.

Service was made by depositing a copy of this order or judgement, together with any papers required by USCIT Rule 79(c), in a securely closed endorsed penalty cover in a United States mail recaptacle at One Federal Plaza, New York, New York 10007 and addressed to the attorney or record for each party at the address on the official docket in this action, except that service upon the United States was made by personally delivering a copy to the Attorney-In-Charge, International Trade Field Office, Civil Division, United States Department of Justice, 26 Federal Plaza, New York, New York 10278 or to a clercial employee designated, by the Attorney-In-Charge in a writing field with the clerk of the court.

LEO M. GORDON
Clerk of the Court

By STEVE TAROY
Deputy Clerk

Date: September 8, 2000

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C00/71 9/7/00 Ridgeway, J.	Doskocil Food Service Co.	97-06-00954 (Port of Cleveland) 96-09-02131 (Port of Milwaukee)	8417.80.00 5.3%	8419.81.90 3.3%	Agreed statement of facts	Milwaukee, WI Cleveland, OH smokehouse with one smokehouse generator
C00/72 9/11/00 Eaton, J.	Capital-Mercury Shirt Corp.	98-02-00324	6205.20.20 20.9%	6211.32.0060 8.6%	Agreed statement of facts	Charleston men's long sleeve quilted jacked y/d flannel 100 % cotton

ABSTRACTED VALUATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
V00/19 9/7/00 Aquilino, J.	D-Link Systems, Inc.	97-09-01522	Not stated	at the invoice unit prices set forth in Revised Invoice Number 5E2189 attached to this stipulated judgement	Agreed statement of facts	Los Angeles integrated circuit capacitors, resistors and other computer components

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